



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

IDEALS OF THE REPUBLIC

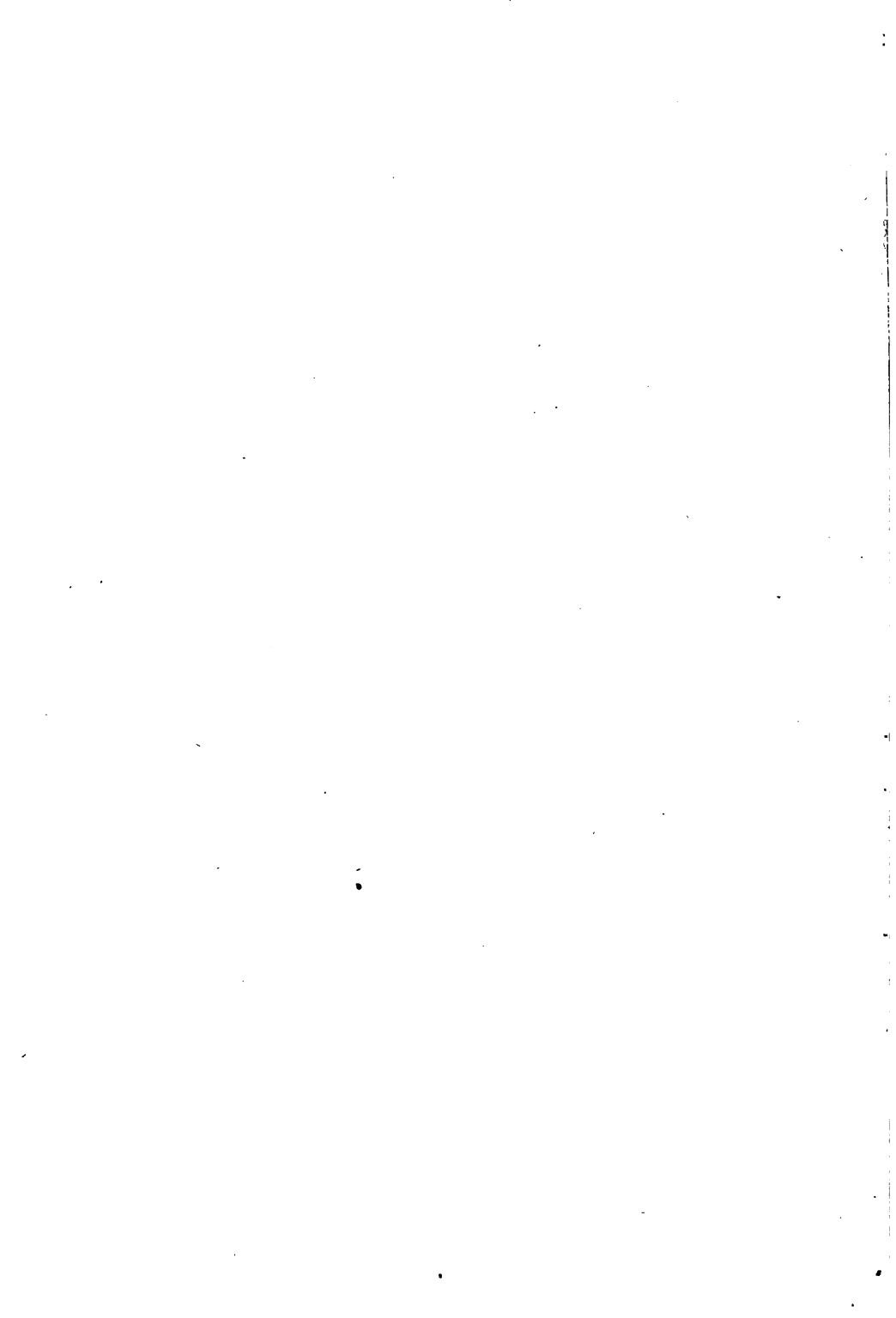
JAMES SCHOULER

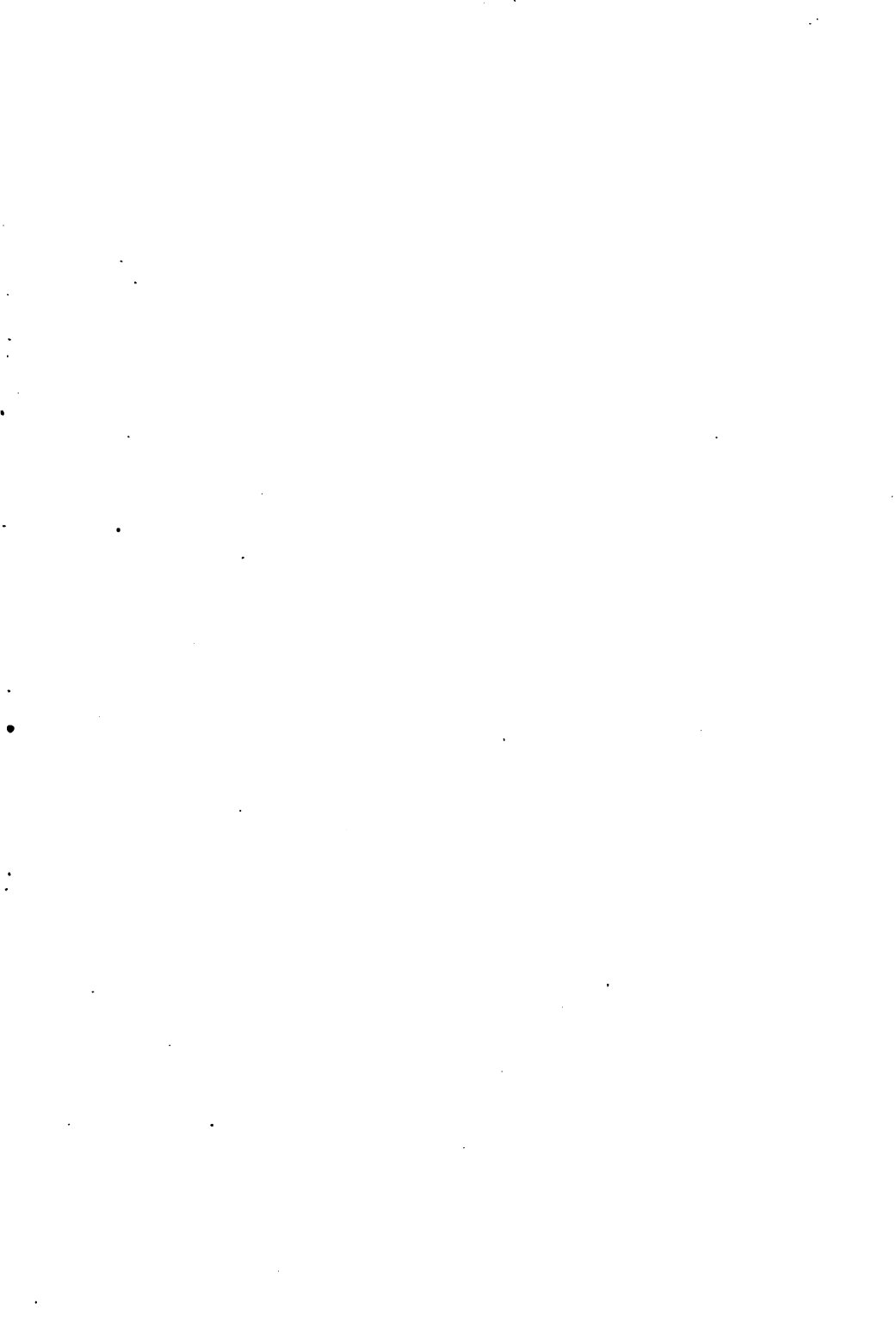
FEB 26 1909

LIBRARY
OF THE
UNIVERSITY OF CALIFORNIA.

Class

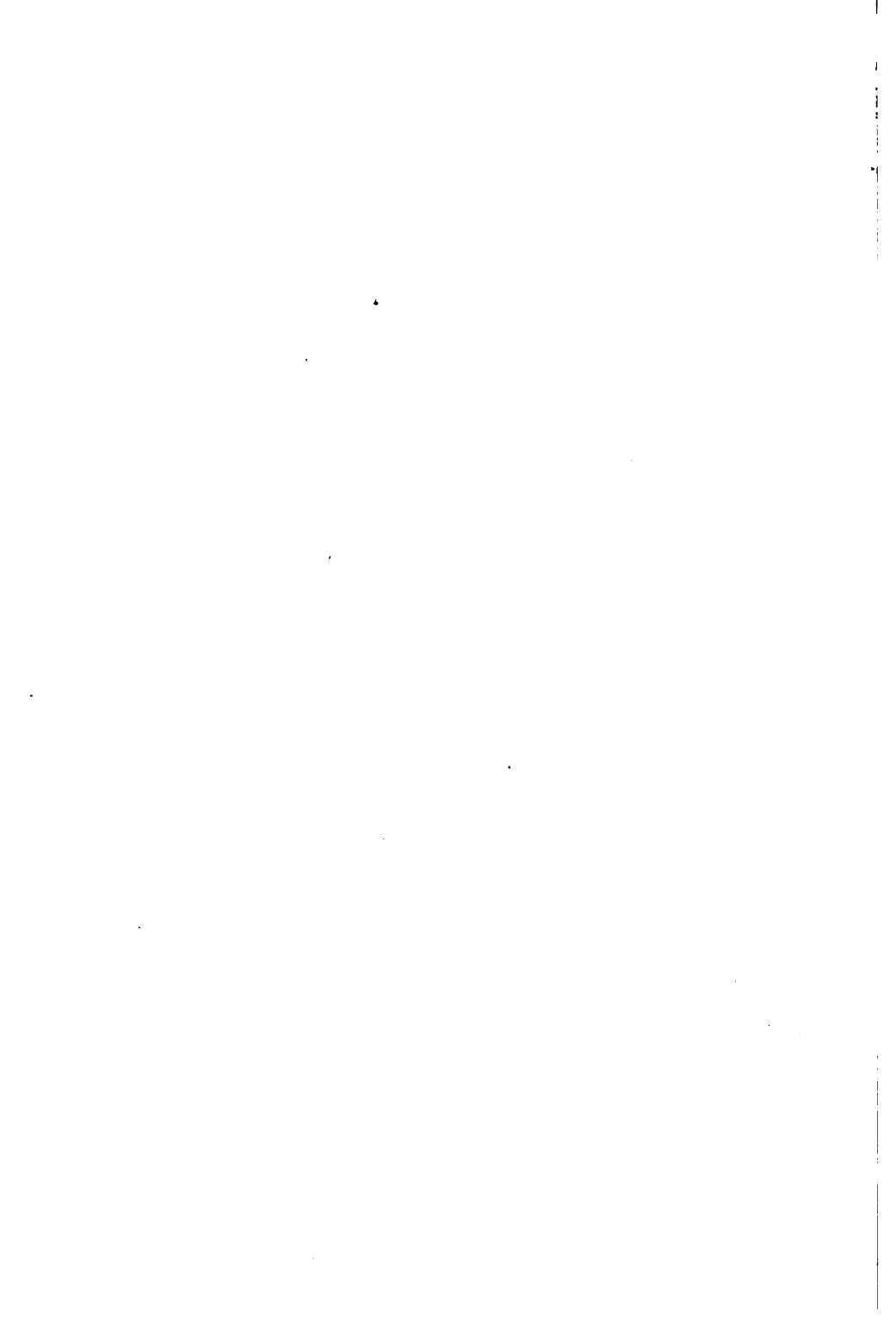








IDEALS OF THE REPUBLIC



Ideals of the Republic

By

JAMES SCHOULER, LL.D.

Author of "History of the United States," "Eighty Years of Union,"
"Americans of 1776," etc.



BOSTON
LITTLE, BROWN, AND COMPANY
1908

JK271
S4

GENERAL

/1100

COPYRIGHT, 1908,
BY JAMES SCHOULER.

All Rights Reserved

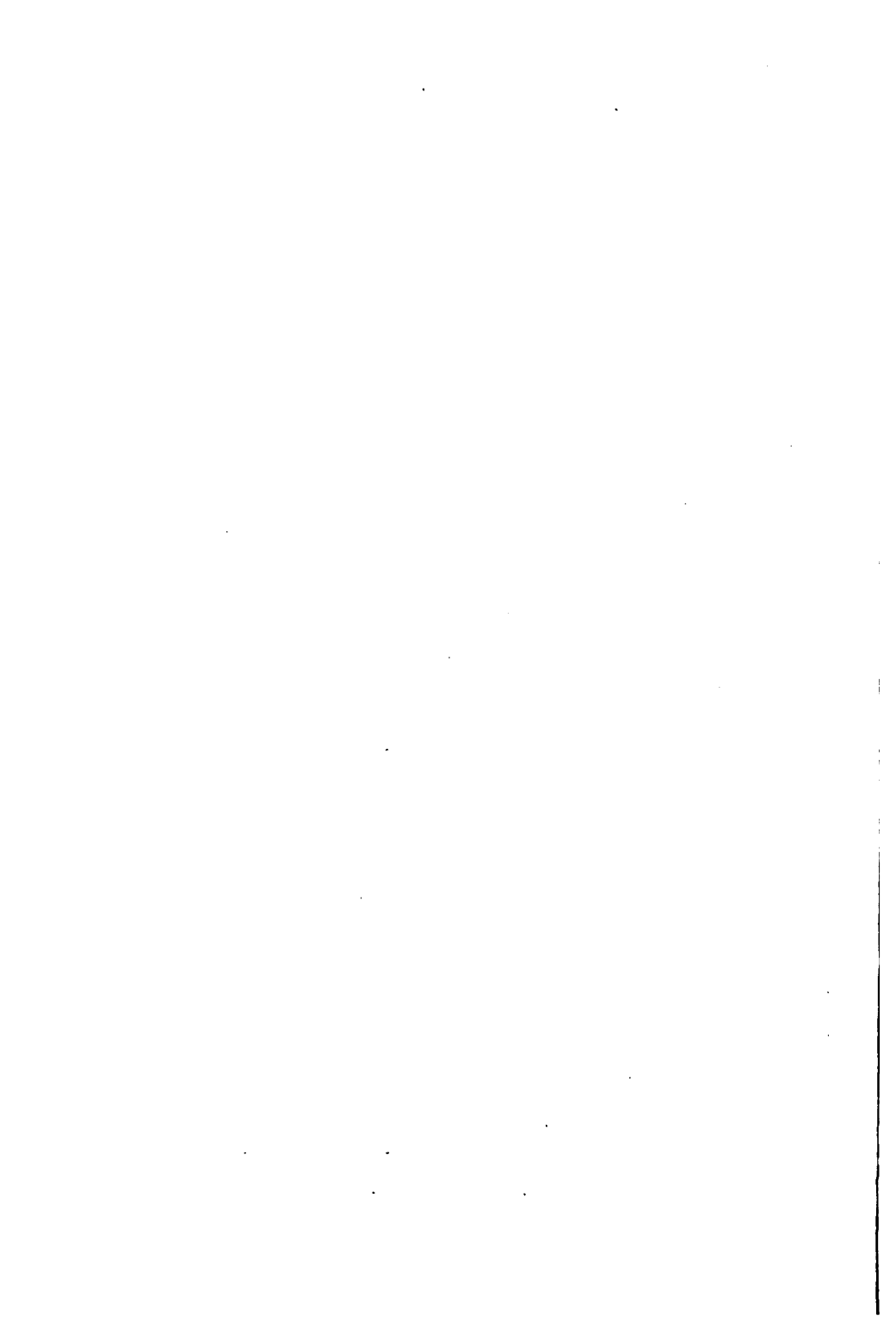
Published October, 1908

COLONIAL PRESS
Electrotyped and Printed by C. H. Simonds & Co
Boston, U. S. A.

PREFACE

The purpose of the present volume is to trace out those fundamental ideas, social and political, to which America owes peculiarly her progress and prosperity, and to consider the application of those ideas to present conditions. The substance of these chapters is comprised in occasional lectures given by the author in 1906-08 at the Johns Hopkins University, to close a connection of seventeen years with its Historical Department.

SEPTEMBER, 1908.



CONTENTS

CHAPTER I

PAGE

THE RIGHTS OF HUMAN NATURE

Modern diffusion of news and influence—America's new example to Europe—human rights as defined by Declaration of 1776—origin of such maxims—John Locke and our Revolutionary leaders—life, liberty and the pursuit of happiness—property and family rights—man's real entrance into political society—rights unalienable and rights by sovereign favor..... 1

CHAPTER II

TYPES OF EQUALITY

The equal creation of mankind—equality in unalienable rights—natural endowments as affected by environ and education—theories of heredity and of natural equality compared—American experience as to leaders exceptionally great—social inequalities reconciled—a final difficulty as to racial distinctions—historical changes, ancient and modern, in leading types—ethnological study of the negro—Indians, Africans and Asiatics in our American experiment—the racial problems of to-day—universal brotherhood in the future, or else the separate independence of races..... 23

CHAPTER III

CIVIL RIGHTS

Relation of individual to organized society—natural rights as adapted to citizenship—definitions under our amended

	PAGE
constitution — civil rights and their limits — present fundamental maxims considered — due process of law, just compensation, habeas corpus, restricted right of search — safeguards in criminal prosecution: jury trial, evidence, etc. — fair bail, punishments and fines — testimony by the accused — present methods in criminal procedure imperfect	47

CHAPTER IV

POLITICAL RIGHTS

Political and civil rights distinguished — allegiance and modern self-expatriation — freedom of speech or press — freedom to peaceably assemble, petition, etc. — local self-government favored — army, navy, militia — treason and its punishment — insurrection or civil war — American experience in 1866 — participation in government as office-holder — tests and requirements — participation by voting — modern extension of suffrage, ballot reforms, etc. — closer popular government by referendum or initiative — strength of an intelligent democracy — religious rights	71
---	----

CHAPTER V

GOVERNMENT BY CONSENT

This the fundamental basis in American conception — governments many and independent — a public strength and security — theory of compact or common consent — good of the whole, not of greatest number — government essential to society, not a punisher only — men born and created equal — religious inspiration of our founders — other forms of government by consent than republic — right to reform or alter institutions — respect for custom and existing government — the Dorr rebellion and its lesson	88
---	----

CONTENTS

ix

PAGE

CHAPTER VI

WRITTEN CONSTITUTIONS

American political calendar fixed — March 4th and national elections — origin of our written schemes of government — colonial charters and the theory of popular compact — declaration of rights and a framework — advantage and disadvantage of written schemes of government — interpretation of a written text — methods of amendment — rigidity or elasticity in construction — popular self-constraint — public opinion the final arbiter, if court fails in duty..... III

CHAPTER VII

A UNION OF STATES

American and English documents of freedom — ours a compound scheme: *e pluribus unum* — colonies developed into States — State constitutions popularized; the referendum, etc. — colonial difference — Union reached with difficulty — colonial tendencies to unite — Confederation; the more perfect Union — not national to-day, but federo-national — constitutional construction in federal courts — relative authority — frequent recurrence to fundamental principles..... 133

CHAPTER VIII

THE DISCIPLINE OF LIBERTY

Natural and social or political freedom — full individual freedom impossible — just and reasonable restraints considered — religion, laws and government — Mill's essay on liberty — despotic and liberal institutions — individualism not a true democracy — the Mill theory too broad — restraints upon drink, etc. — Bellamy's dream of socialism — all government imports authority — ideals of conformity should be cherished..... 158

CHAPTER IX

THREE DEPARTMENTS OF GOVERNMENT

Separation of powers, legislative, executive and judiciary — the Montesquieu maxim — each department independent of the other, but all answerable to the people — legislature and a representative system — the Roman senate — local self-government in its origin — Parliamentary government compared with our own — how far initiative and referendum may apply — the American executive, State and federal — rotation and stability — the veto power, etc. — our judiciary and its functions — checks and balances in the three departments..... 18a

CHAPTER X

PARTIES AND PARTY SPIRIT

Two opposing parties not always needful — eras of good feeling — party spirit, English and American — love of country paramount — parties should be agencies of the people for definite achievement — party organization in our history — “Republican” and “Democratic” machines — independence in politics — power of the press and oratory — recent reforms: the Australian ballot, primaries, voting machines, etc. — voters above party managers..... 207

CHAPTER XI

SERVANTS OF THE PUBLIC

Servants or agents at the law — public servants answerable to their masters, the people — public employment freely open — sinecures, nepotism, rule of rotation — spoils or civil service methods — boards and commissions — recent municipal experiments in simplified rule — theory of three departments here inapplicable — public servants and public-utility concerns — our post office and the railways — government regulation rather than ownership..... 23a

CONTENTS

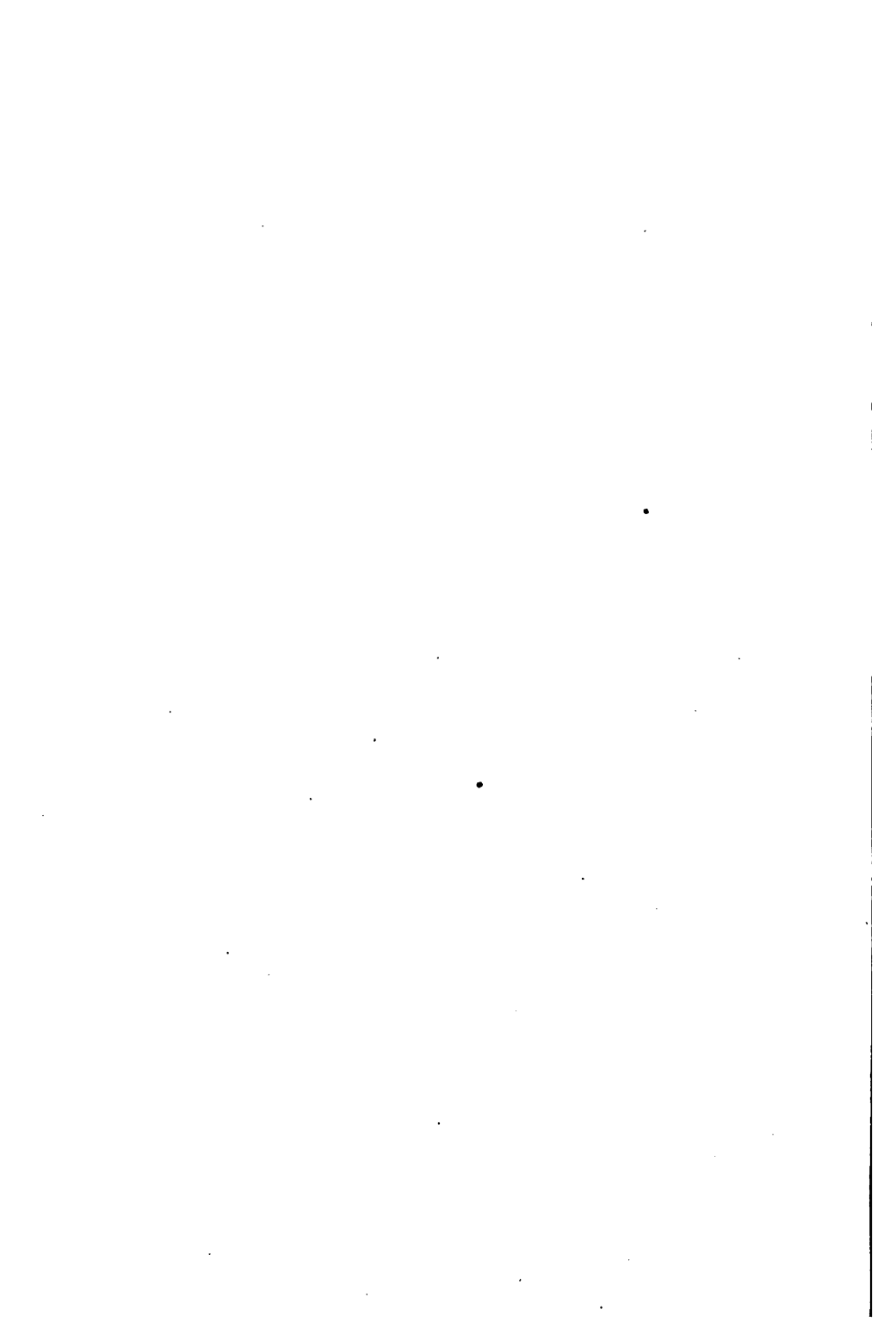
xi

PAGE

CHAPTER XII

THE STRIFE TO SURPASS

Its relation to social equality—the two correlated forces of American life—our social development in such respects—equalizing tendencies should restrain the strife to surpass—modern corporate methods in business—responsibility of directors—labor and capital—great contrast of wealth and poverty undesirable—social duties of the rich and prosperous—duty of government by indirect checks, etc.—tariff, income and inheritance taxes—government prevention better than punishment—punishment should be with forbearance—serenity in rule better than severity—inordinate greed our radical trouble—the promotion of good humor.....	259
A NEW FEDERAL CONVENTION.....	289





IDEALS OF THE REPUBLIC

CHAPTER I

THE RIGHTS OF HUMAN NATURE

THE round world which we inhabit seems at this late day smaller to grasp and comprehend in its surface life than ever before; and this, notwithstanding its constant increase in numbers, its complexity of peoples and pursuits. The rapid and universal diffusion of daily news accounts largely for the change wrought in this respect. We may not be more patriotic, more earnest, stronger in natural vigor and the power to construct and originate than were our ancestors of a hundred years or more ago, but we see and touch things in much broader relations than they ever did or dreamed of doing. Take, for instance, the immense development of steam transportation by land and water during the last sixty years, which brings countries, once far apart, so close together; which enables us to traverse distant parts of the globe once separated, or indeed to go wholly round it. Think, too, of the marvellous triumphs achieved in the instantaneous transmission of news by the electric spark,—with cables and a wire ligature, or by

oral converse through the telephone for long distances. All such inventions draw the human race into closer intercourse, change the old laws of commerce and trade, and with the aid of our modern journalism, enterprising as never before, bring the chronicle of distant nations and their rulers into the full meridian light of a single day ; exposing the public conduct of human affairs, national or international, the acts or accidents of life, to the constant and contemporaneous inspection and criticism of the whole civilized world, as though before some vast tribunal constantly in session.

How differently might our Revolution of 1776 have worked out, had not these thirteen colonies been practically remote from the mother country, when they threw off their allegiance and pronounced unitedly for freedom. How differently developed might have been certain crises in our Civil War which depended upon European combinations and diplomacy, had not the Atlantic cable, whose success we prematurely proclaimed in 1858, lain a dead mass of wire in the ocean's bed, until renewed after the Union had been re-established.

Out of this modern approach to a combined universal knowledge and forcefulness come a closer conformity or rivalry in government methods, a convulsion of social elements favorable to democracy, and a sort of comprehensive review, from day to day, of the pageant of passing events the world over, with the consequent force applied of an international public opinion daily formulated. "The Parliament of man, the federation of the world," may yet be realized on this globe by another century.

Yet, scarcely a century ago, thrones throughout

Europe were overturned, blood was poured out profusely, revenues were forcefully exacted and prodigally spent. Such are the direful perils with which one new century or another opens. And as Lord Byron, early in the nineteenth century, hailed this new republic across the seas where freedom's sun then shone serenely, while on his own continent "the name of commonwealth was past and gone," so did the American people, in those years of their youthful strength, confidently hold in sight of that older continent the torch of their own example and maintain the faith of those precious institutions which the fathers had struggled to establish. "We stand the latest and if we fall probably the last of mankind," was the adjuration of one of our own orators, which sank into heedful minds.

Here, then, developed thus early, on virgin soil, a United States of America, swelling proudly of the stars and stripes and other emblems of a sovereignty; encouraging by their own high example the weaker peoples of Spanish and Indian origin who sought a similar system of self-government free from all European dictation; we shed the light of rational liberty as a beacon to the oppressed of mankind the world over. And the cause of America's influence already, as a world's power, was the knowledge she diffused on problems of self-sovereignty, and the new faith she inspired through institutions deeply grounded upon the universal rights of human nature.

Let us, in these chapters, begin by discussing at length those fundamental truths announced for

ourselves and for all nations or commonwealths organized upon a popular plan after our own example, in the noble phrasing of the Declaration of 1776: "That all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness; that to secure these rights government is instituted among men."

These truths were announced as self-evident, and were held to be such by all who signed the instrument at Philadelphia and made themselves responsible for the ordeal of bloody resistance to Great Britain at the peril of lives and fortunes. Furthermore, they were set forth by our Continental Congress solemnly and devoutly. Like the agreement of the people of England on parental soil, in an earlier century, when they rebelled against their King, Americans of 1776 claimed such individual rights as the endowment of their Creator. It was not that men are simply *born* equal in respect of such rights — perchance under some blind and fatalistic scheme of natural necessity — but that they are *created* so, and that the intelligent source of our dignified state of existence, whence each derived so noble a birth-right with a portion of divine intelligence, is the Almighty Himself. America holds, and the people of all civilized nations in all ages should hold, as essential to any just progression of the human race, a rational belief of some kind in man's intelligent subordination to God's law, in our eternal derivation for an eternal life, in each one's personal responsibility for his own career in this life, with preparation for an immortal existence hereafter. Men of learning grow material on this point in their

ardor for material facts; yet materialism causes the one fascinating secret of nature, the one problem that interests all mankind, to elude and escape them. "Never," observes Canon Scott-Holland, "was the contrast more vivid or more crushing than now, between the astounding practical efficiency of our scientific handling of earth's material treasures and the futility of our search for the hidden mystery."

Truths "self-evident," however, must long have been recognized by a people before they can be rationally promulgated in such a form or accepted as an inducement to coöperative action. The Virginian who composed this Declaration, did not claim to have originated such a philosophy; nor did Franklin or John Adams, his elders of the sub-committee who fully approved what he had drafted; nor did those Continental delegates who voted and signed, with but few verbal changes, the solemn instrument. When challenged in later life as to his authorship, Jefferson disclaimed all pretence of inventing what he had here formulated, but said that he had expressed himself simply as the thoughts shaped themselves out in his own mind, turning neither to book nor pamphlet while he wrote the paragraphs. This assertion we may well believe. John Adams, in a letter of 1822, which was meant to serve history, gave due credit to the composition as it came from one whom his colleagues trusted, reporting hastily the instrument to Congress in Jefferson's own handwriting. But with somewhat captious jealousy he adds: "there is not an idea in it but what had been hackneyed in Congress for two years before." And in proof of this he refers to a Declaration

contained in the Journals of Congress of 1774, — as also to a Boston pamphlet voted and printed by the town of Boston before the first Congress met at all, which was composed, he says, by James Otis and pruned and polished by Samuel Adams.¹

"Hackneyed" in ideas as to the whole instrument is strong language to use. No document which for the first time announces a solemn Revolutionary purpose can fairly be deemed a document of hackneyed ideas; its very essence is that of a new determination. For not until leaders and a constituency are fully ripe for throwing off their accustomed allegiance as subjects do they adopt the tone of defiance in place of protest and petition; still less do they announce the intention to plant themselves upon the assertion of natural and individual rights as a basis for new institutions to be founded in and through their own consent.

The address made (October 26th) by the Congress of 1774 is before me, with its "humble petition," "earnestly beseeching of his Majesty a gracious answer," and wishing him "a long and glorious reign." Wrongs suffered are here set forth, to be sure, as a catalogue of grievances; but they are stated astutely, as rather the infliction of legislators in Parliament, of the governors and other agents sent hither by a sovereign, than of the sovereign himself. For practical redress, the effort, first of all, had been to separate the King from bad counsellors and trust to his personal intervention at home to correct the grievances of these distant subjects. So Congress, in 1774, on the common behalf, vouched for the people as the King's "loyal

¹ John Adams's Works, 512.

subjects, who fly to the foot of his throne and implore his clemency for protection." "We ask but for peace, liberty and safety; we wish not a diminution of the prerogative, nor do we solicit any new right in our favor." "We yield to no British subjects in affectionate attachment to your Majesty's person, family or government." And proceeding in such a strain Congress defies the most subtle and inveterate enemies of these colonies to trace the unhappy differences in America to an earlier period or to any other causes than those herein stated. All this language of dutiful supplication suited the prevailing temper, more especially in those middle and southern colonies where oppression had not been great. In short, the Confederate Congress of 1774 spoke, while war clouds were gathering, the sentiment of that earlier year, just as our national Congress in 1860-61 made utterance on the slavery question; each conforming to a reluctant public sentiment at a time when relief was sought and hoped for without resort to dire extremities. But the Declaration of Grievances, to which John Adams more particularly refers, claims boldly¹ that these colonies "are entitled to *life, liberty and property*, and they have never ceded to any sovereign power whatever a right to dispose of either without their consent."

A sterner document, no doubt, was that to which John Adams referred as emanating from the town meeting of Boston, still earlier. In the press of that town was advertised, during 1773, "The American alarm, or the Bostonian plea for the rights and

¹ By way of amendment proposed by John Sullivan of New Hampshire to the original draft. See 2 John Adams's Works, appx. 535.

liberties of the people."¹ All this, however, we may surmise, in default of clearer testimony, was the language of rebellious opposition, not of pronounced revolution; and Massachusetts in such utterances was quite in advance of the other colonies.

But Boston had, still earlier, disseminated her views of the coming crisis by local correspondence, and indeed had published them to the world, by way of self-defence against the crown. In fact, an earlier Boston pamphlet, which records the proceedings of a town meeting held in November, 1772, seems really to have contained the germ of Jefferson's later statement of the rights of mankind, such as I am considering; and most likely it is that pamphlet to which John Adams's letter refers in connection with James Otis's composition. For here the inhabitants in their "vindication to the world," published a committee report which set forth (1) the rights of these colonists as men, as Christians and as subjects, and (2) the infringement and violation of those rights from which they suffered. To this enumeration of natural rights I shall refer presently.²

Once more, some have claimed that our Declaration of 1776 bears a strong resemblance to that of the United Netherlands in 1581. True, the action of our thirteen colonies parallels in history that of Holland nearly two centuries earlier; but no careful

¹ The Massachusetts Gazette reports this town meeting of 1773 as issuing "an earnest and inflammatory address, indignant over the wrongs from which that province suffered," which recited at length the various encroachments made upon the inherent privileges of Massachusetts freemen by the parent government, and declared indignantly that these rights they would not subject to "any usurper under heaven." I cannot find an authentic copy of this address.

² See copy in Boston Athenaeum which I have examined.

reader of Motley's "Dutch Republic" would undertake to pronounce the two instruments of independence at all alike in expression. There is not the slightest likelihood that the earlier one in its strange tongue served in any sense as a model for the later. Motley himself, who taught his fellow-countrymen to compare the two revolutions by his scholarly research among the records of the Netherlands, tells us positively in his narrative that the old Dutch Declaration, in respect of primal truths, put forth simply the idea that all government should be conducted for the benefit of the governed, and he adds that its framers were content with their own historic and monarchical institutions as then existing. This Dutch instrument argued approvingly the divine right of kings, even while justifying the people in the dethronement of their monarch. "Like the actors in our own great national drama, before the crisis came, they were struggling to sustain, not to overthrow; unlike them, they claimed no theoretical freedom for humanity, promulgated no doctrine of popular sovereignty."¹

But to inquire more closely how those first truths came to be proclaimed so confidently in our great document of 1776 and upon what philosophy of civil government this American Union of ours came permanently and historically into being. The exordium, with its unique and original expression of basic human rights, has, most of all, immortalized this instrument and made it educational to posterity. What changes have already been wrought in human

¹ 3 Motley's Dutch Republic, 511 (Part v, c 4).

government, through the steadily pervading force of those terse pellucid phrases, like dropping water! Our states have, one by one, for more than a century, incorporated those same formulas of equal rights and government by consent into their separate constitutions; emulous and struggling republics in the two Americas, and in Switzerland and elsewhere, and possibly France besides, have copied such phrases, almost word for word, and modelled their own governments upon the same theory; and withal, by the logic of a single strong sentence, we ourselves, as a people, were led to strike the manacles from a race once held subject sectionally because of complexion.

To understand the real origin of those pregnant truths, we recall, at the outset, that our Revolutionary fathers were not only British subjects in allegiance, but, for the most part, of British lineage, speakers of the English language, inheritors of the common law. Other elements of our population, like the Dutch, Swedes, Finns or French Huguenots, themselves identified rather with the European mainland, were comparatively scarce among settlers of that century. Anglo-Saxon or Anglo-Norman by an immense preponderance, our immigrants cherished, with their mother tongue, all those rights and privileges which their sturdy progenitors had wrested from British sovereigns: Magna Charta, trial by jury, habeas corpus, the right of representation and the rest. Such phrases of the common law were familiar to them as "life, liberty, property," or in the English wife's version, "life, liberty, dower." Historically, moreover, our colonial migration was connected with the English civil war, so

that the ideals of Hampden, Vane, Sidney and the rest, which the later Stuarts frustrated, grew apace on this side of the Atlantic, while they faded out seemingly at home. Even on parental soil, however, reaction against royal prerogative went far enough to bring to the British people the Bill of Rights of 1689; and that kingly concession, secured through Parliament when resettling the crown, proved to our colonists here an important bulwark.

But it was John Locke, the English author and scholar, whose popular essay on government chiefly and most closely embodied and transmitted to our Revolutionary sires the fundamental ideas of civil liberty which their own progenitors had evolved in that earlier protracted struggle on parent soil. Not a practical framer of institutions, so much as a philosopher and guide in abstract principles — and this the failure of his colonial plan for South Carolina shows clearly — he upheld the doctrine of popular rights, with strong insistence, against all arbitrary rule or oppression, and in that respect our American settlers far and wide became his earnest disciples. His life spanned the vicissitudes of that civil strife in England from which a continental sojourn had detached him largely, and he died in 1704, a great disseminator for posterity.

Locke's claims as a philosopher in other fields of speculative thought we need not consider; but what here interests is the political school of ideas to which he gave such strong direction; though himself indebted much, as he acknowledged, to Hooker, that judicious English divine, whose first principles concerning church polity, he himself developed rather for temporal rule. John Locke,



then, more than any other man, cast the mould of this American Republic and drew up as architect the plans of our political fabric. "The natural liberty of man," he contends in his treatise on government, "is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only nature for his rule. The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative power shall enact, according to the trust put in it." When Locke wrote, the modern distinction between executive, legislative and judiciary functions in a state was not clearly conceived; so that where he thus speaks of legislature or legislative power, he means civil sovereignty in general, however framed or exercised.

"Life, liberty, estate" — "life, liberty, property" — these were inherent rights linked together in speech, and familiar to the free-born Englishman as bosom truths, long before Locke's essay was written. It is not property alone, nor life and liberty alone, for whose protection to the individual government is instituted. These three stand chief among the inherent rights of man, but are not the only ones; and Locke himself mentions, as still another, "the liberty of innocent delights," which doubtless means much the same as what Jefferson in our Declaration styled "the pursuit of happiness" — either term being, perhaps, capable of expression in the sense of working out unmolested as of natural right the fulfilment of one's earthly vocation.

In the pursuit of natural and unalienable rights,

as thus set forth, the first thing we encounter in human intercourse is the collision of our own individual rights or desires with those of others; whereupon force asserts the mastery in a state of nature, failing that persuasion which must rudely enough have been applied in primitive times; and hence the weaker rival goes to the wall, deprived and dispossessed. It is chiefly to apply the paramount rule of impartial justice with its remedies or redress, in all such collisions, all such infringement upon one's natural rights, that government with its organized and irresistible force, capable of supremacy, is instituted by the people. "All men by nature are equals," observes Locke;¹ and again, "men being by nature all free, equal and independent, no one can be put [rightfully] out of his estate and subjected to the political power of another without his own consent."² But, as he also concedes, God makes man a social animal and leads him into society. And (we may add) in the social state these fundamental rights of nature require for their due application that no one, in the enjoyment of his own life, liberty, property or the pursuit of happiness, shall molest the corresponding rights of others. Only an organized government, however, can work out such a principle intelligently or efficiently.

Such, then, was the exposition of natural rights and the origin of government with which our forefathers in these thirteen colonies had become fairly familiar, long before they consented to force a rupture with George III and their mother country.

¹ § 54.

² § 95.

Here upon a new soil, thinly populated and in its primitive wildness, they seemed face to face with nature herself, and capable of working out, in their own collective experience, the primary problems of human society, such as Locke had expatiated upon in his essay. And as time went on and our several colonies grew stronger, the innate love of personal independence and of equality in social condition asserted itself more and more among our inhabitants, while the desire of a separate public existence increased as royal and parliamentary exactions grew burdensome. Nor was it alone the rights of a loyal British subject that the colonist was led here to consider, but whether a life-long and submissive allegiance to Great Britain rested upon him at all as an inherent duty, because of mere birth in the King's dominions; and whether the peculiar conditions which developed this new hemisphere with Europe so far away might not justify him in asserting independence and home rule at a last extremity. All this brought our individual colonist to a study of first principles and the rights of nature, and those principles had become so rooted in men's minds by 1776 that Jefferson could formulate them in his draft without turning to any book for guidance.

In toasts, in mottoes for public occasions, in epigrams of the local press, and in resolutions adopted by town or county political meetings, sententious expressions such as I have quoted were used for popular effect in those pregnant years. Beccaria, an Italian scholar and philanthropist, published an essay on crimes and punishments which circulated in an English translation; and one passage therein

which spoke of "supporting the rights of mankind" John Adams used with effect in 1770, in the Massachusetts colony, when defending some patriot soldiers. Still earlier had James Otis by 1763 denounced the transgressions of British rulers as against the province law of Massachusetts and "the rights of mankind." When the Stamp Act was promulgated, our popular protest was "liberty, property and no stamps." John Dickinson, then of Pennsylvania, whose "Farmer's Letters" of 1767 made so profound an impression through these colonies that Bostonians in Faneuil Hall voted him thanks for his vindication of American rights, laid down as a postulate that "government is instituted for the benefit of those governed," and that "the first principles of government are to be looked for in human nature." And as "Farmer" still, in a somewhat later essay, he claimed "liberty, life and property," as rights which men ought to possess, but could not practically, if others had a right of taking them away at pleasure.

Finally Paine's "Common Sense," — that last and anonymous appeal through the press, whose calm and cogent reasoning brought, most of all, our people and Congress in 1776 to the irrevocable decision, — announced the author as an open and resolute friend and a virtuous supporter of "the rights of mankind" and of "the free and independent States of America." And the title-page of his pamphlet quoted with pertinence a couplet from Thomson, the English poet:

"Man knows no master save creating Heaven,
Or those whom choice and common good ordain."

But to come more closely to the pronouncements of the Declaration, let us examine those votes and proceedings of the inhabitants of Boston in November, 1772, to which I have alluded.¹ The report of a committee, made and adopted at that meeting, enumerates the rights of the people as men, as Christians and as subjects. "Among the natural rights of the colonists," it asserts, "are these: (1) right to life, (2) to liberty, (3) to property; together with the right to defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature."

"All men have a right to remain in a state of nature as long as they please; and in a case of intolerable oppression, civil or religious, to leave the society they belong to and enter into another." "When men enter into society it is by voluntary consent; and they have a right to demand and insist upon the performance of such conditions and previous limitations as form an equitable original compact." "Every natural right not expressly given up, or from the nature of a social compact necessarily ceded, remains." In such a strain discoursed this Boston pamphlet; and Locke's essay was frequently cited to support its postulates.

We may well suppose that other abstract statements of man's unalienable rights and of the true origin of government were framed and set forth in American towns and colonies during these formative years, notwithstanding the fact that Jefferson's compact expression of such ideas, which has since become the standard, originated with his pen.

¹ *Ante* p. 8.

There were few colonial newspapers at that era and none of daily publication; nor did the press report public proceedings with anything like our modern fulness of detail. The pre-Revolutionary archives of our town and county meetings have not been well preserved for posterity. Probably, if we could now bring to light the resolves and addresses which originated in local public gatherings of those years — 1770 to 1776 — we would find such fundamental truths again and again asserted by patriots. Here, for example, is one little town of the same Massachusetts, whose record of 1773 happens to have been preserved, showing her rustic citizens making public claim of such inherent rights, in language borrowed plainly from that of the Boston resolutions. That town in Worcester County — Mendon — exists to-day, but only as a dwindling hamlet among central highlands, with less than a thousand inhabitants, whose name is chiefly preserved to us by its early association with a melodious psalm-tune long popular in congregational worship.¹

It is worth observing that in our Declaration of Independence the rights which Jefferson instanced as among those "inherent and unalienable" differ somewhat from the usual phrase which I have dwelt

¹ If the so-called "Mecklenburg Declaration" of 1775, purporting (as re-written from memory long years after) to antedate some of the expressions used in our Declaration of 1776, had claimed a prior assertion of "the inherent rights of man," instead of identical turns of phrase toward the close of the instrument, the authenticity of that production might be less questionable. Our latest writers on that topic fairly establish that a meeting was held in 1775 in Mecklenburg County, North Carolina, at which stirring resolves were adopted; yet the language of those resolves remains in impenetrable doubt.

upon, since the right of property is not mentioned at all. His omission here may have been casual, or due to a desire of original composition; or it may have been his purpose to bring out in stronger relief, at such a crisis, those dearer rights to every one which Congress now placed at jeopardy. But, doubtless, the right of property was meant to be upheld. For the sacredness of individual ownership in things real or personal was deeply ingrained in our Anglo-Saxon nature. "The reason why men enter society," says Locke, with a curious corresponding omission, "is the preservation of their property."

An impressive speech, made as late as 1820 by Judge Story in the Massachusetts Convention of that year, brings into clear relief the idea of property rights, such as our Revolutionary sires had always inculcated; and its fine imagery should deepen the impression made upon such of us as live more or less of the year by the ocean. "Those who are wealthy to-day pass to the tomb, and their children divide their estates. . . . Property is continually changing like the waves of the sea. One wave rises and is soon swallowed up in the vast abyss and seen no more. Another rises, and having reached its destined limits falls gently away, and is succeeded by yet another, which, in its turn, breaks and dies gently on the shore. The richest man among us may be brought down to the humblest level; and the child with scarcely clothes enough to cover his nakedness may rise to the highest office in our government." "It is a mistaken theory," proceeds this orator, reverting to his main argument, "that government is founded for one object only" — that of personal

rights. It is "organized for the protection of *life, liberty and property* and all the comforts of society — to enable us to indulge in our domestic affections, and quietly to enjoy our homes and our firesides."

In one respect, and only one, as it seems to me, is this whole theory of the natural rights of men, who institute government by intelligent compact, a defective one, and the passage I have quoted suggests it. It does not take into account the sexual origin of the human race nor the primitive law of family. Locke's philosophy would seem to imply that mankind consisted of males alone; and of males, moreover, naturally capable of comprehending and providing for their own individual rights and wants the moment they enter society. But the facts of human existence are quite different. As with the brute type of animals, male and female of human-kind are created together and for one another; both sexes seek society not for general intercourse alone, but from the family and propagating instinct, the desire of a pair to live together and rear a family — which is the strongest, the most persistent, and the most endearing of all passions, all affections, planted in the human race. And in the parental relation itself we see the precursor, the kernel and epitome of all authority upon earth. Except for God's first created pair or pairs, every one who is born at all, male or female, lies for awhile helpless in the cradle, unconscious of natural rights, unable to preserve even life, the most essential of them all. To parent or parents primarily one looks for early protection, maintenance and education. The child needs a careful supervision and guardianship during

the growing period of infancy; and in return he renders what juvenile service he may and learns subjection and discipline, first of all, in a stage of life preliminary to asserting intelligently or making binding compacts over his own individual birthright. There is, therefore, in effect, a human government for us all, when we enter upon human existence, and that in its inception instituted after the pattern of divine sovereignty over the whole human race. It requires at the outset perfect submission and obedience to some other and stronger will, whose depth and purpose one may not fathom, but in whose tender compassion he seeks wholly to confide. The family relation, when offspring are prolific, enlarges into that of tribe or patriarchal clan; and it is thus combined, — and with family intent and reserve — that men and women first of all seek society, uniting under a government, and not as individuals equally competent. And the strongest force in human society, whether to seek civil government or to resist its undue external pressure, is found accordingly in that unit which we denominate family. Man comes into the compact of civil government, not alone as a mere individual, but as head of a family, as patriarch and representative of his own household, and natural rights in that relation he aims thereby to secure with other rights.

Truths which had become truisms by long acceptance are justly to be deemed and defended as truths, once more, whenever a new and arrogant generation, through skeptical perverseness or some overpowering wish to change the custom, calls them into question.

But the profound utterances of our Declaration are no mere "glittering generalities," as a brilliant rhetorician once styled them in disparagement. They serve us as a perpetual bill of rights. "The doctrine that men are endowed by their Creator with unalienable rights," says an eloquent orator of to-day, "rights which the government did not give and cannot take away — and the doctrine that rights are gracious grants from a sovereign government to a subject people — the difference between these two doctrines is so great that an ocean can roll between them. In fact, an ocean does roll between them, for the former is the American doctrine and the latter the doctrine of European countries."

Whatever, then, may be misrule, the occasional lapses from right public conduct and direction, who of us that has once lived under a government in which we each had a voice and a potential influence to make things better and to apply a co-operating corrective, — who would willingly exchange such a government for that under an autocrat, however benevolent, whose source of authority lies wholly independent of ourselves? Who of us would willingly forfeit his personal liberty as the price of dispensing with that eternal vigilance which all liberty requires? Who of us does not feel that, despite all individual differences in worldly advantage or opportunities, — all abuses uncorrected and yet capable of correction, — a spirit of comradeship and sympathetic brotherhood unites us in pursuing the ideals of civil life? As our Continental Congress stated it after the war for independence had been successfully waged, so should we wish to say whenever some great public end has been achieved by

an honest and united effort of the citizens: "Let it be remembered that it has ever been the pride and boast of America that the rights for which she contended were the rights of human nature."

CHAPTER II

TYPES OF EQUALITY

THE initial phrase in the second paragraph of our Declaration imports the natural equality of all men in their creation. That phrase in its literal expression has proved a stumbling block to superficial readers. But it need not so greatly perplex us if we but consider the just interpretation of such language.

That "all men are created equal," is, in the first place, here collocated with the statement of unalienable rights with which our Creator has endowed all mankind. Herein, most emphatically, they are created equal. In life, in liberty, in the pursuit of happiness and the similar essentials of a rational existence, God regards all mortals alike in their rightful opportunities for a career, whether as towards himself or towards each other. The whole drift of Bible inspiration is to establish that the Supreme Being is no respecter of persons, — that we shall all be held accountable hereafter for doing here to our fellow-men as we would be done by, and for loving and respecting our neighbors as ourselves. Even in the manifold relations of a practically organized society, ranks and visible advantages in life are or ought to be adventitious and changeable; and nothing in the primary sense holds more universally true of all mankind than the in-

herent right of each individual to work out, independently of coercion or constraint, his own responsible course in life, whether in one relative sphere of experience or another. "The rank is but the guinea's stamp," says the poet. Under the benign influence of our modern jurisprudence, the courts are open for the enforcement of rights and the redress of wrongs, to all citizens or subjects alike, regardless of station or influence.

A man may not, as a matter of fact, be my equal, or I may not be his equal, in moral, intellectual or physical powers, nor in those advantages for worldly fame and influence which education, inherited wealth or pedigree may afford, at the outset of responsible activity in life. Children born into the world are not born equally capable mentally nor equally healthy. The proposition that all men are equal, as Locke observes, does not mean all sorts of equality; for age or virtue may give precedence, and excellence of parts or merits may place some one above the common level; birth may subject some and alliance or benefit others, to pay an observance where nature or gratitude may have made it due. Yet all this consists, he says, with the equality all are in with respect of jurisdiction or dominion one over another; since every man has "an equal right to his natural freedom without being subjected to the will or authority of any other man."¹ And so, too, in 1809, when Jefferson, the framer of our familiar phrase, received from a French author a volume upon the "Literature of the Negroes," which asserted a higher mental capacity in that race than society credited, he wrote thus: "Be assured that no person

¹ Locke §54.

living wishes more sincerely than I do, to see a complete refutation of the doubts I have myself expressed on the grade of understanding allotted to them by nature, and to find that in this respect they are on a par with ourselves. * * * But whatever be their degree of talent it is no measure of their rights. Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others."¹

But we may go even farther in our argument and contend, as a matter of wholesome theory, at least, for encouragement, that the natural endowments of mankind in any race are very much alike, given the same means and opportunities, the same training, the same environment, from the cradle up. And a dogma like this may serve to bring the standard for human progression more nearly to its true place, by upholding the dignity and worth of all human endeavor for each and every individual who contributes to our world's development. Such a standard we should oppose to those degrading notions which long prevailed under an ancient civilization, whereby birthright in its merest accidents was to determine fixedly the whole status of life itself, whereby millions of human beings lived out their span only to subserve the lust, the caprice, the ambition, the cruelty or the rapacity, of absolute rulers or nobles born with the external means of commanding. It is true that in natural gifts of intellect or bodily strength all are not literally alike — to some are given five talents, to others two, and to others only

¹ 5 Jeff. Works, 429.

one. The doubling of such endowment does not produce equal aggregate results. Yet the good use required from each possessor follows the same rule, and from mankind generally is expected the same proportionate gain, each according to his birthright or the measure of gift and opportunity afforded him; nor ought even the humblest possessor to despise his own talent or endowment for its inferiority, nor to bury it in slothful concealment and disuse where it can earn no increment.

And while alluding to this familiar parable of the New Testament, let me remark that I for my part have always sympathized most strongly with those who, endowed in life not much more than the humble average of men, have yet sought steadily to improve such gifts as the Almighty has seen fit to bestow upon them, and have made the best use of their modest means and occasions for the welfare of others and their own self-improvement. Such efforts have interested me and commanded my respect even more than those of the brilliant few, talented beyond all others, widely worshipped, proudly self-conscious and supremely successful. And hence I have sometimes wished that the lord of the parable who called his three stewards to account, upon returning from a journey, had bestowed upon him of the two talents, instead of his more favored associate, that one talent of which the wicked and slothful servant was deprived; so as to make his total as great, at least, as that with which the most gifted of the three started as steward. For, as Senator Hoar once wisely observed, much of the good work in this world has been that of commonplace persons who have done their best.

Some philosophical writers have made much of heredity as a prerequisite of noble living, instancing, to support their contention, that pedigree we so highly value in breeding domestic animals. But such comparisons have their obvious bounds. It is mostly for frisky, vivacious, emulous traits, such as bear upon physical energy and excellence for bodily service, that you sire your race-horse with selection. But when it comes to the essentials of a noble human existence, range of intellect, will power and the development of high moral virtues in the individual tell upon life's competition and achievement more than any mere bodily superiority; and here the effect of education and environment upon man or woman becomes an element immeasurably greater towards the attainment of perfection than that of mere heredity. Heredity counts still, to be sure, upon human character, and sometimes counts greatly; but who that reads the record of our American people, after the lapse of less than a century and a half under our broad and peculiar experience of government, will maintain that a cycle of caste counts more in a country for human development or capacity? The sway of some wise and benevolent despot, over a people well ordered and submissive, may afford a grand spectacle of imperial strength; but immeasurably stronger stands the government which unites the hearts of an intelligent and moral people whose social conditions are in natural motion, so that each individual among them is encouraged to better his condition; and where the chief ruler is one of their own free selection from among themselves.

How far, then, heredity of birth and blood alone may assure among mankind a superior quality of physical and mental vigor in combination, and of what we term high spirit or character, — how far it feeds and promotes the fire of divine energy in human breasts, — science has not determined, nor can it readily. In the great progenitor of a new and illustrious family we have such strong and leading qualities in marked abundance, and paternal and maternal traits are found combined in each individual of one's immediate family offspring. But whether it be the silent and corpuscular transmission of such traits in the blood that counts most essentially, and not rather the transmission of parental example — of an influence and education, through father or mother — in impelling the young child forward and inspiring a family emulation, is yet to be clearly established upon accessible facts. Japan is not the only country that feels the force of ancestor-worship. We see descendants, or those purporting to be such, proud of their illustrious lineage and pedigree, striving to live up to the cherished ideals of their forbears, and yet, while doing so, ignoring often immediate parents or grandparents, whose individual careers perchance made blots in the escutcheon, but whose blood, nevertheless, flows more intimately in their veins.

Such reverence for heraldry and a family tree, though doubtless of great exemplary influence upon one's own career, is not so largely innate, then, but external. The force is analogous to that of tradition, — of high examples generally, such as those of friends, patrons, educators, benefactors, all possibly of different blood. How happily placed

.

by birth and early surroundings is the child of him who has achieved great wealth or distinction, so far as opportunity may push one forward; yet a refined mediocrity and uselessness in life may prove the real result, in such offspring — "great respectability but small account;" while too often, indolence, indulgence, the yielding to temptation, may sink or impair the stock, since position or wealth itself brings drawbacks. The "blood that tells," in the world's estimation, tells mainly for that generation which startled contemporaries by its own spontaneous energy and its recognized even though rude capacity to originate and rule. Great names become forgotten in the offspring that inherit them. Meanwhile, some upstart of low or obscure pedigree shows the rare gift of leadership in politics, business, science, literature or the arts, and he in his turn wins an illustrious fame which he would fain transmit to his children but cannot. America might have borrowed from the old world a Washington or a Roosevelt; but a Lincoln, a Grant or a Cleveland could hardly, on European soil, have guided a nation's destinies. What children or grandchildren in our land have duplicated the high renown of Franklin, of Jefferson, Clay or Webster? Respectable scions or offshoots from such distinguished families we have had, to be sure; and as judges, merchants, bankers or in the lesser posts of routine occupation, sire and son of integrity have well filled out often a succession, where genius neither gave nor required a scope. England herself may have had many dukes, earls or bishops of a certain designation who made good family careers not always in close succession, but in creative in-

tellest she knows but one Shakespeare, one Milton, one Lord Bacon; while we too, sprung from England's loins, recall but one Jonathan Edwards, one Irving, Longfellow, Hawthorne or Emerson. To all rules there are of course exceptions, but supposed exceptions vindicate the rule. It is thus, therefore, that nature forever frustrates those who would make their own family predominance hereditary and lasting in the world's remembrance.

I recall but one illustrious family in American annals which has furnished hitherto a President of vigorous and independent statesmanship in two generations, with grandsons and great-grandsons still later, worthy by talent and pre-eminence of a similar exaltation; and this family, of sturdy yeomanry, took its rise in the man who first succeeded Washington as chief magistrate of the Union and imparted to his favorite son ambition, education and superior opportunities for public station. All these Adamses have been civilians and statesmen by training and inclination, and a transmitted example, with the personal desire for fame and public usefulness, conduced to a continuous industry. So, too, example rather than heredity kept up renown among France's Napoleons, in collateral kindred. As for Europe generally, the hereditary succession of kings rests already, as a doctrine, upon convenience and national stability, more than upon the old and effete idea of an inborn excellence and an innate capacity to rule; while the British peerage itself is only perpetuated in influence, under the wastage and decay of families once fruitful in fame, by the infusion of new blood from the newly illustrious in some sporadic sphere of activity, who

are ambitious of titled honors for themselves and their offspring.

Inequalities exist, and must always exist in human society, while remains on earth a possible scope for individual advancement. In our own land, — one professedly of equal rights and equal opportunities, — men are seen intent, and often inordinately so, upon gaining the pomps and vanities of life, with the distinctions, often petty, of mere title or social position. They seek to found families upon great wealth, and even to make marriage alliances by purchase with the bankrupt scions of a European aristocracy. Yet American life, on the whole, is of healthy movement in these days and fosters real happiness, with an amiable vanity, perchance, rather than an isolated pride. The man of wealth may do great good with his money, if he abstains from low and pampering pleasures.

A highly intelligent German who has come to live among us, as a close and sympathetic observer, reconciles the present social inequalities of American life by an apt illustration. It is, he says, as though some congenial company were to take dramatic parts, each presenting theatrically one civil pursuit or another, higher or lower in the conventional scale, while underneath all such mimicry rests the basis of real equality, of a genuine regard, each for the other's standing and character, in the fundamental recognition of a common brotherhood. For when the wealthy and the working people come together in this country on a matter of public concern, they meet with a certain freedom and self-assertion by

each individual, quite unlike the old-world or old-time intercourse of mankind, with its supercilious arrogance or condescension on the one hand, and a fawning or cringing obsequiousness on the other.¹ Such an aggregate difference of manners from those to which he had been accustomed in his native land strongly impressed this observer; and so does it impress Americans themselves who travel much in European countries, or historical scholars who closely compare the pre-Revolutionary standards here of social intercourse with those of our own more enlightened age.

The change in manly demeanor among Americans has been due to the growth of a more literal belief in those fundamental maxims of equality which the Declaration proclaimed. And surely, the idea that we are all brethren and fellow-citizens together inspires to noble life. Society still erects and maintains its conventional barriers, its fences, its sacred enclosures; yet social change and fluctuation have become so incessant among us that all such barriers prove but partial for staying the encroachment of an irresistible tide of democracy. No social set anywhere can exert impressive influence which does not to some extent court politics and political power; and hence an American exclusiveness, disdainful of politics, leads naturally to frivolous pleasures and irresponsibility. While levelling principles prevail here, education tends to equalize the opportunities, and success in life by wealth or worth carries its legitimate rewards for leaping the barricades of the elect. It is not so much, then, the primal advantages at birth that

¹ Hugo Munsterberg's "Americans."

count for individual advancement in a political society like ours as self-improvement, assiduity, tact and good manners, under all circumstances. The gentleman, wherever born, is he who combines gentle and considerate manners with self-respect. And self-improvement, self-gain in the individual assures the collective expansion of that whole society of which each one among our many millions feels himself a member and an integral part.

So much, then, for our theory of a republic and its social composite, as placed in contrast with the government where a few are privileged over the many through the accident of birth, where hereditary rule, aristocracy and the transmitted right to govern and monopolize are still maintained; for the principle favored and fundamental in this land of ours that all are created equal in the rights and possibilities of life, as against those ancient conceptions of fixed conditions, fixed caste, fixed pursuits in life, so prevalent still in the old world. We contend, as the basic fact in our development as a people, that, given the equal opportunities of early environment, tastes and training, one human being of a race is quite as likely to expand to greatness as another; or, at all events, that usefulness may abound, and that those found less than their fellows in one respect of acquirement may readily prove greater in some other, so that high aims and high character may pervade our people regardless of mere pedigree. The humbly virtuous may inspire the intellectual, and a master-farmer or master-mechanic can teach something to the best trained scholar from the university. Even where we must admit that actual equality does not exist as men now



come into social contact with one another, we hold up that high ideal for aspiration and encouragement to the coming race.

A final difficulty of definition remains and that the greatest of all. Is our doctrine of man's equal creation to be asserted for our particular race alone, or as a universal one for all races alike and for all types of mankind? Is it a maxim for whites, for Caucasians only, or does it comprehend the Indian, the Mongolian and the Negro? Does it apply to races apart or to all races collectively? In the restricted sense alone many would construe this dogma of the Declaration, and an application to our own race is the most obvious and convincing. White men discovered and colonized America, organizing its institutions as they exist to-day; they planted the seed, tilled and cultivated the soil of democracy; and in the virtual assumptions of a civilized settlement this has been constantly a white man's government, with ideas brought from Europe and modified. But is this all? The racial differences of mankind are profound and far-reaching, each of us must certainly admit. So far as ethnology yet proves to us, races are most original in preserving their distinctive traits when they keep own breeds apart, untainted by infusion. Yet infusion makes an inferior race more forceful. Admixture and contamination have set in, whether within or without the law, and the half-breed Indian or mulatto offspring make present trouble, partaking, as they often do, of the mingled vices conjointly with the mingled intellects of their progenitors, and discontented as they well may be

with an equivocal place in society. And even more than this may be stated. America's growing difficulty lies not in a mere difference of complexion, — of people white, red, black or yellow, brought into close contact. Even in our Caucasian race, as among the other leading types of mankind, subdivisions exist whose tendency to marriage alliance would be naturally apart; for Scandinavians, Slavonians, Teutons, Saxons and Italians, all elements in our population, differ considerably in blood and temperament.

But are we satisfied to leave the theoretical equality of human creation and of man's inherent rights to depend upon distinctions like these, or to assert our maxims as for a separate racial application? No conception of mankind which regards our human creation as a universal brotherhood can fairly do so. None which accepts a belief in divine revelation or imports to the human race a common origin, a common destiny, or a common preparation for judgment and eternity. The real neighbor, as the Christian parable defined it, is the friend of every one he encounters in life, — even the mean or the alien. Hence the true missionary spirit of our religion, the proselyting of souls, the uplifting of all nations, the spontaneous promptings of a broad benevolence, are all against the permanency of dominant and subjected races in relation; against the brother's keeper; against lasting rule by force and disdain; against exploitation by the stronger or the chattelism of the weaker. When we read authentic history, we perceive change and displacement among the races striving for predominance; with no one of them constantly in the lead or innately supreme.

In successive eras the savage has become civilized, and the civilized has lapsed back to savagery. The enervated and corrupt go headlong to destruction; the stagnant and stationary are outstripped by the rudely vigorous and energetic; the race once despised gains dominion and the despising race falls into decay.

Races which boasted their own superiority in the past have been overcome by races once deemed inferior. The time was when Egypt conquered and gave to what was then the known world letters, arts and institutions. Western Asia overcame Egypt, Greece overcame Western Asia, Macedon overcame Greece, Rome overcame all these together. Rome herself, stretching her empire far and wide, forgetful of her own simple antecedents, yielded at length to barbarous northern hordes, prominent among whom were the rude Gauls and Saxons. Modern Europeans have vied with one another in monarchies, more or less limited, until at length in this new dawning century the British or British-American proudly conceives himself to be the rightful leader of the universe. Yet what do we already discern on the horizon of the Orient, where the pagan Japanese strides rapidly into greatness, hopeful to redeem his long despised Mongolian type of mankind from European contempt and spoliation? This people Russia lately opposed in direful conflict, her own vast Scythian population long reckoned by the English-born but semi-civilized; and yet of growing influence, despite defects, among the recognized powers of the earth and giving promise of more liberal institutions in the future.

From Oriental countries man derives the earliest rudiments of learning and the arts, our Christian

religion, all the great systems, in fact, of sacred philosophy which have endured through centuries. From southern Mediterranean Europe came classical literature, music and the fine arts, and those fundamental codes of civil jurisprudence, too, which regulate the relations of modern commerce and all equitable procedure. Northern Europe and the Anglo-Saxon supply our common law and the rudiments of individual and domestic rights and civil liberty, strong in their pristine simplicity. Spain discovered and came near appropriating to herself this new world. We Americans, aided and befriended at the outset by France, take now strong precedence for moulding politically this western hemisphere; yet who can say, in view of past history, that we shall preserve our lead in these two Americas through centuries to come, if we become blind to the fact that there are distracting racial elements here in our own midst, as well as in our continental vicinity, to deal with justly? That all compulsory rule over alien races or peoples is and must be precarious and prone to vast vexation, wherever the true spirit of conciliation and fraternal sympathy are wanting?

Race characteristics, then, racial relations, do not remain constantly the same in human life, among confronting governments; nor are the problems of race superiority and domination to be determined for all time to come by prevalent social or political conditions. The dusky Indians, whose fate within our own expanded domains well nigh reaches extermination, because of a constant antipathy which kept settlers and aborigines at enmity, have fared much better in Spanish-American jurisdictions to the

south of us, where they coalesced, mingled with their conquerors, and have produced great leaders.

Our chief racial problem here in the United States is, of course, with the negro; but to this we may add, if ambition drives us to conquest in Asia and its outlying archipelagoes, that of other colored types, besides, with whom we have already been brought into difficult and unassimilating relations. Between the negro, on the one hand, whom the mercantile avarice of progenitors brought to our Atlantic shores by force, and the Malay or Mongolian of the Pacific, on the other, whom we seek to repel from a desired settlement among us, the safe guidance of this Republic, bearing its ark of the covenant, will through centuries to come be a difficult one. We cannot safely deal with exotic races save as equals in God's sight, capable of self-improvement and self-government, and entitled to considerate dealing and their own liberties, so far as we deal with them at all. We must educate if we keep them. We must respect their own customs and preferences. We must regard them ultimately as fellow-natives or brethren, as fellow-inhabitants, as children of a common Father, as men created with equal natural rights to our own to enjoy with us; or else we must seek to exclude, to dismiss, to part with them, to encourage their departure, and bid them God-speed elsewhere with their own chosen systems of rule founded in their own free consent.

As to American negroes, once held in slavery;

their immense numbers, their rapid proportional increase as a race in our very midst, during the last forty years, to dismiss them or to re-enslave and reduce them to utter and permanent subjection, is not easy, nor industrially desirable; nor can any eventual exclusion be safely looked for without a mutual consent and their own voluntary separation and departure.

In the Dred Scott decision of 1857, — now happily set aside by the mandamus of a people's retribution, though at the cost of fratricidal war, — the majority of our supreme court held that negroes were not included, nor meant to be included, in the general words of our document of independence; that they were regarded in 1776 as "beings of an inferior order and altogether unfit to associate with the white race, either in social or political relations." But an able minority of the court dissented from that opinion; and for historical statement the majority seem to have erred here in laying stress upon old colonial laws that really applied not to the blacks alone, but to early bondsmen, both black and white. Our greatest statesmen of 1776 had unquestionably regarded the Declaration of that year as holding up the highest ideals for our united future. Jefferson emphasized this when he said: "Every man and every body of men on earth possesses the right of self-government; they received it with their being from the hand of nature." So, in the anti-slavery petition of 1789 to Congress, to which the great Franklin set his last public signature, it was laid down that "equal liberty was originally the portion and still is the birthright of all men."

A distinguished educator, President G. Stanley

Hall,¹ who has made a calm scientific study of the negro as he exists in America in this later era of emancipation, states that of the African race — the only one in fact among mankind that ever came to this country without its own consent — the descendants in 1900 under the last census numbered well nigh nine-fold of the colored population found here in 1800; and that, adhering, as they now incline, to the warm South, the problems concerning them for an indefinitely long period are likely to grow every year in complexity, as well as practical importance. No two races, taken as a whole, he observes, differ historically so much in their traits, both physical and psychic, as the African and European. He candidly admits that it was an error of opinion at the North — in which he honestly shared — which gave to the negro the ballot in 1867, as a protecting or a penalizing weapon to be used at the South; and he hails the new and reconciling plan of Booker Washington to maintain, at the present stage of our great problem, the social and political difference of his people from the whites, but yet to unite the two races industrially for the general wealth and advancement of the community. To this programme our educator suggests but one modification that seems needed, and that is what the accomplished Du Bois pleads for, on behalf of colored men like himself: opportunity for all the higher cultural elements of education to every exceptional negro who can take and make good use of it.

President Hall recognizes in this colored race great capability when thus wisely conducted in its progress; in such gifts, for instance, as an intense and large

¹ Mass. Hist. Society Coll. Feb. 1905.

emotional life, an exquisite sensitiveness to nature, large talent in the field of music and oratory, rare good humor, patience and jollity, capacities for friendship, loyalty, patriotism and industry, and, notwithstanding strong sensuous passions such as discouragement and hate must drive him to indulge so brutally, a peculiar depth of religious life. To this just statement I may add that recent records at the Patent Office show our native negro an inventor of industrial contrivances of decided usefulness, thus refuting the opinion formerly prevalent among us that the negro mind is incapable of originating.

Whatever, in the dim future, may be the destiny of this hitherto despised race so intimately and pathetically, even if unfortunately, blended with our own, let us welcome that kindly study of their traits and capacities which may sooner or later afford a truer understanding of our social problem, and place the solution of their proper destiny upon a solid and rational basis. The time has now come (I quote President Hall's own language) to "take the problem out of the hands of politicians, sentimentalists or theorists, and place it where it belongs — with economists, anthropologists and sociologists."

That other stern racial problem of to-day — namely, the relation which we Americans are destined to sustain towards Asiatics of the Mongolian or Malaysian type, towards whom we have lately assumed some perilous responsibilities in the Philippines, — has reached a primary stage only, where we are comparatively free to sheer off and leave the solution to its course. A new word has lately come into vogue among Americans, once trainers of all their territories into co-equal statehood, — it is the

word "dependencies;" it has no rightful place in our political vocabulary, and I pray that it may some day depart. As for Mongolians of the Asiatic mainland, where we have claimed as yet no solid footing, though more than once fitting, moth-like, near the flame of Europe's commercial candle, we practise at present the policy of exclusion from our domains on this continent. And so far as the antipathy of races on home soil may endanger our institutions, and tempt us to racial subjection or a degrading admixture of blood and temperament, I am for the policy of Asiatic exclusion here, under a wholesome and enlightened regulation, with just and suitable exceptions.

Against Mongolian, Malaysian or African elements among the future population of these United States, I would interpose all the solid barriers possible for maintaining socially the purity of that white and European stock, whence we ourselves are derived, and to whose dominance hitherto the strength and stability of our free institutions are chiefly due. Nor should I wish that other white settlers here from the continent of Europe should supplant those natural leaders of America in whose veins flows the blood of a British lineage. Yet to the future American of Caucasian antecedents all the present nations of Europe are destined to contribute. And even as against those repugnant races of complexion totally different, to preserve, unmixed and uncontaminated, our racial types, is not, among a conglomerate people, of easy accomplishment. We abhor, we detest, so we say, all such amalgamation. And yet our only

real shield of relief thus far is that of illegality, illegitimacy; and in unlawful promiscuous concubinage nature herself contradicts our postulate that all races must of necessity keep separate and undefiled. In point of fact, society will need to fortify itself more strongly, not so much by more stringent laws condemning the status of such offspring or spouses as by the active prosecution or interception of white men bent upon their own sensual delights and reckless of results. As for miscegenation of complexions in *bona fide* marriage and a sexual companionship of love and constancy, those who are themselves of blended blood will yet make trouble for the publicist and legislator, wherever the old impediments of race, color or social condition are already ignored and individuals may consult their tastes and personal inclination in such matters. With regard to Oriental admixture, I read quite lately, in one of our newspapers, of a young white woman who took right willingly for her husband a Chinaman who had become somewhat Americanized in habits and converted to Christianity, and avowed openly her preference for him over any white man of her acquaintance.

In all such racial problems of the future, as it seems to me, the idea which most naturally approaches faith in the common capacity of all mankind for self-discipline, self-improvement and a high advance of civilization, is to become the dominant one for future centuries; so that though the world may never reach the perfect realization of natural equality in fundamental human rights it will yet approximate such a solution, justify our Declaration as applicable to all mankind, by races at least, and

vindicate each separate race among them in the assertion of its own rightful freedom and independence. That kingdom on earth for which we pray, whose type is as that of the kingdom of heaven, cannot possibly consist in a brute survival of the fittest, nor in the appropriation of all the good things upon earth by any one favored race or nation. This world was made for all mankind to live upon and for all humanity to share in.

Different types of mankind have come to dress more alike, to approach each other in cleanliness, and we find in consequence that they look more alike. The Caucasian himself in the remote wilderness or mining camp, — rude, unlettered, dirty, ill-dressed, delving in the dirt like a dog or carousing intemperately, — is a repulsive enough object; while on the other hand we already recognize with something of affiliation the cleanly and polite Oriental who has adapted himself in costume and manners to America. The neat and vivacious Japanese, trained in our high schools, is but a Mongolian, after all, and a heathen; though thus far we have found him a more captivating type of the Mongolian than his predecessor, the uncouth Chinaman, opium-eating, outlandish in habits and costume, who seems so doggedly impervious to the ways of those among whom he seeks a degraded living as laundryman or cheap laborer. But in whatever race of mankind, there is a long, long distance between the rude manual toiler and the polished son of scholarship and refinement.

Surely, then, race assimilation may extend much farther than in our present age of experience

among human creatures. Yet the racial differences of mankind, I admit, may well have established obstacles socially impassable for human nature in any wholesale sense; and hence man's universal brotherhood, under which that grand postulate of an equal creation was first put forward for experiment here, may at some future date of our history prove to consist, not in radical amalgamation so much as in a parallel advancement of distinctive types in color and complexion. In the latter event not only will the Orientals of Asia preserve and vindicate on their continent their own autonomy, but we may look in the far future for a voluntary exodus of our native civilized Africans from the whites who once enslaved them, when blessed with leaders and educators of their own race, wholly enlightened and competent to conduct them forth. Finally may come about, in the providence of God, the just reapportionment of this earth's wide surface, so that each leading race may at length develop apart its destiny over domains exclusively its own. If the lion and the lamb are not in this world's millennium to lie down together in perfect peace and harmony, each will be found entitled to his own safe fold, free from the other's aggression.

For the long interval, however, a novel, notable and perhaps decisive experiment of racial growth and interfusion awaits us of America, in respect, most intimately, of the negro problem. And in dealing with the successive stages of that experiment we should neither shirk the share of intelligent duty which devolves upon our own generation nor speculate too idly upon conditions which may exist after we ourselves have passed away. No false altruism

of the present can guarantee the moods and methods of those who are to succeed us. Unquestionably the duty of the present is to educate, to strengthen, to uplift the black freedman in our midst, and most of all to encourage in him the capacity to contrive for his own betterment, and make himself a useful and self-supporting member of the society in which his present lot is cast. We are not likely, out of compassion and tenderness, to welcome him to our several homes too readily, nor to grant him again a premature political advancement; yet, all the same, we should hold fast to the eternal truths of man's equality and capacity for self-improvement upon which our whole fabric of government primarily rests. And, however scrupulous we may be in avoiding that defilement and deterioration to ourselves which might come from too familiar a racial intercourse, we should avoid still more insistently that worse deterioration which awaits inevitably both races where brutal domineering and rapacity on the one side conduce to brutal hatred and violence on the other. We have failed as civilizers with the Indian problem of the United States; let us not fail equally with that of the more confiding African.

Nor as to human equality itself, in the broadest sense, need we imagine that we or our children shall see that happy state existing; yet, none the less, should liberal laws and liberal administration tend to its establishment; for, given a universal progression to the human race, we shall surely approach that condition, however slowly,

CHAPTER III

CIVIL RIGHTS

CIVIL rights grow out of the relation of individuals to an organized society, to civil government. They are in strictness defined as those of a citizen (*civis*) by birth or adoption in a commonwealth, as distinguished from inherent individual rights as they rudely exist in a primitive state of nature. No special procedure is needful to make the native-born a citizen; for citizenship is the birthright of all who are actually born in our jurisdiction, though one of foreign birth must be naturalized in order to fully acquire such a status.

The citizen learns the full source of his privilege, as such, whenever he exercises political rights at home, or, while abroad, comes into collision with some foreign potentate and seeks to have his own government intervene and protect him against menace or outrage. "I am an American citizen" is a plea, the world over, quite as effectual at this day, if not so specially privileged, as that of the ancient free-born Roman, against inflicted death, plunder of property, or personal captivity in a foreign land. Yet the great fundamental rights which a civilized country recognizes and protects, in modern times, are not literally and exclusively confined to citizens. For in those earliest articles of amendment

to the constitution of the United States, which secure to one, as against his own government, religious liberty, free speech, a free press, the free right of petition and immunity from unreasonable search and seizure, it is not simply citizens whose rights and immunities are thus definitely upheld, but "the people." And again, in those articles of amendment which follow, sustaining the individual against all arbitrary arrest or imprisonment, or the attempted deprivation of life, liberty or property without due process of law, it is "no person" who shall be held thus answerable at the caprice of the public, nor shall "any person" suffer molestation in such fundamental rights.

If all "persons" are thus entitled to protection from the government, no harsh discrimination in such respects ought to be drawn against those foreign-born among us who have not been formally naturalized, but might be if they took the proper steps. I am aware that our supreme court has in some late instances seemed to discredit so liberal a doctrine, while announcing, as against all "aliens," that Congress may order them deported summarily, at all events, as well as forbid their arrival. And thus does the principle of the old "alien law," which made such outcry during John Adams's presidency, find judicial vindication in another century. But all this seems best applicable to great public emergencies, or so that the United States may send or keep away those from abroad who make an undesirable element in our population and are not readily absorbed into the common mass. For useful, peaceable and intelligent members of our society in times of peace all the usual civil safeguards ought to avail,

whether they are technically "citizens" or not; and all the more so if it can be shown that they were virtually accepted here as desirable persons, under all the circumstances, through lapse of time, or have meant to become legal citizens and had not full opportunity.

Under all civilized government, one has political as well as civil rights and duties. But these should be stated apart, and hence in this chapter I confine myself to the rights and duties more purely civil than political, — to such, for instance, as should entitle women and children, as well as men, to the ample shield of the law, whatever their legal disabilities, and even though the right to vote or hold public office be wholly denied them. These civil rights, appropriate to all who have the status of citizens — or more broadly as including "persons" resident or part of "the people" — are largely deducible from the rights of nature which I have considered, though modified somewhat to suit the exigencies of organized society.

Indeed, to a great extent, civil rights are practically the rights of human nature, as applied and developed in a society under civil government. Thus, life, liberty and property are still rights inherent in the inhabitants of an organized commonwealth, while each one of us must respect all others in the exercise thereof. Moreover, the commonwealth exerts its collective force through the courts, or by some other just exercise of sovereign authority, so as to sustain each individual in his rights, under due limitations, and punish the refractory. Besides

civil redress in damages or otherwise for private injury or a breach of contract, criminal discipline is afforded; jails and prisons are built, the gallows is erected, and a convicted culprit forfeits life, liberty, property, all that he has, it may be, in punishment for his transgression upon the rights of another. Then again, government, with sovereign functions to execute, with its possible emergencies and the paramount relation which it sustains towards all who live under its control and authority, interferes still further with one's natural and individual rights; transgression may be made upon the rights of government itself. Male conscripts are enrolled to fight, taxes are levied, crimes against sovereign authority, such as treason or rebellion, are added to the category of the criminal code. So, too, with regard to man's inherent right to conjugal companionship and the founding of a family, public policy here limits and defines, for the sake of good morals and the welfare of society, the extent of a personal license in such direction. It restrains man and woman from promiscuous commerce even when founded in their mutual consent; it holds divorce under public control; it compels monogamy; it guards the welfare of tender offspring in each marriage union and compels a family support where it may. And finally, in the "pursuit of happiness" or for shaping out an individual career in life, one finds, while in organized society, the delicate meshes of a net cast over him by civil and municipal law, — invisible and harmless so long as he goes on in a just and permissible course, but liable to trip, hinder and entangle him whenever he leaves the permitted path. As Americans and members of this Federal Union we find some such

regulations within the sphere of a national authority; while the vast residuary mass of civil rights and obligations are regulated and enforced by the several States apart.

All civil law, all sovereignty, safeguards, properly speaking, those primitive rights which our Creator has made inherent and unalienable in each member of the human race; and it seeks to comply with Divine injunction in such respects so far as God's mandate may have been apprehended by the law-giver. Even were such rights "alienable" instead, it cannot be presumed that a man means to surrender them. But human government is ever imperfect, like all human endeavor; and hence we find an actual variation of laws and customs for judicial interpretation, from age to age, while impulses of immediate passion and desire often blind both magistrates and subjects to the dictates of eternal justice. All that we may hope for, and more than we see even yet accomplished, is that our human conception of the Divine mandate may become clearer as we progress towards those standards of immutable excellence which blend earth and heaven into a perfect concord.

No more appropriate exposition of civil rights inspired by the later genius of our institutions can be cited in this connection than that which is contained in the first section of Article XIV of amendments to our Federal Constitution. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Here we still see the word "person" used as though to extend still more widely to all actual *bona fide* inhabitants of America the most essential rights of "citizen." Slavery had just been abolished throughout the Union; and here in 1866 the right of citizenship, once denied by our judicial tribunal to the negro, bond or free, was positively extended to "all persons" born or naturalized within our jurisdiction, regardless of race or color. And such citizenship applies, not only to the United States in a federo-national sense, but to the State wherein one resides.

Yet civil rights, even as thus distinguishable from rights political, have their limitations; and during the groping era of reconstruction which followed our Civil War and the downfall of slavery, the courts found frequent occasion to correct those officious friends of the black man who now contended, against all former prepossession and prejudice of our vast majority, that civil rights were fairly tantamount to social rights. Congress, by a civil rights bill, endeavored, but in vain, to break down the walls of obstruction to a free racial intercourse and force whites and negroes to mingle somewhat indiscriminately on terms of equal intercourse. In all stages of human progression, however, civil society may maintain various class barriers of its own, such as custom and personal choice should regulate rather than statute law at all; and the several States,

moreover, save so far as the written text of our Federal instrument proves positive and peremptory, retain their own authority as before, in making police or social regulation within their respective confines.

Public schools, for instance, may be maintained within a State, where colored children and white children are taught apart; nor should the practice of one State in this respect, where most of the population are whites, impede the discretion of another where the blacks are proportionally numerous. And the same holds true of churches, places of amusement, local travel by land or water and inn accommodations. We may, as enlightened citizens in a philanthropic State, avoid such offensive distinctions; but we cannot rightfully force our own views in this respect upon those of other States, nor should we fail to allow for differences of social condition and opinion in commonwealths distant.

Congress, besides its power to enforce amendment XIV, as that amendment provides, has the control of inter-state commerce; but its full jurisdiction over matters of local police and social regulation is chiefly confined to Washington city or the District of Columbia. And there, in those reconstruction years, as I well remember, obtrusive friends of the colored man set him to asserting social claims against reluctant entertainers. One who was refused a seat among other patrons of a fashionable restaurant in the city sued the proprietor for damages. The latter, while the suit was pending, made use of a singular menu which set forth an exorbitant price for whatever might be served at his tables, but stated in print at the bottom "regular patrons supplied at reduced

rate." This meant that white customers alone were to be charged as formerly. The negro lost his case; for the court construed the act of Congress as intended for application to public-service vocations only, and distinguished in this respect between the legal innkeeper, who must entertain all transients alike, and the mere host of a restaurant, who stands upon the usual footing of private business, and may choose his own line of customers, like a lawyer, a physician or a shopkeeper.

In general, then, one's civil rights are deducible from his natural rights, as applied to the existing society to which he belongs. Government secures him, most of all, in life, liberty and property. All citizens henceforth, all persons on our American soil, regardless of race, color, social standing, or any other casual condition of life, are entitled to equal legal protection, if subject to our jurisdiction, and especially if born or naturalized here. One cannot be killed, nor imprisoned, nor deprived of his possessions without due public intervention under the usual safeguards. In matters of civil or criminal procedure, in pleadings, testimony, trial by peers and judgment, — the lofty and the lowly may invoke alike the aid of the courts. "To none we sell, to none we deny justice." The humblest and the poorest in the land of whatever complexion are to be equally upheld in individual rights and immunities with the wealthiest and the proudest. So, too, in the pursuit of life's choice blessings, each, as his means and talents give him opportunity, may take his own chosen course to procure them. Women



and children are to be thus protected and not grown man alone. Any and every adult is free to marry and found, with the spouse, a home and family, and the rights of each in a family shall be respected. "A man's house is his castle" has been a favorite maxim of the common law; and no wanton invasion, search or pillage of one's domestic abode is to be tolerated. In short, to encourage each member of society to keep or better his or her original condition and to improve the individual life as occasion may afford, — this is the high purpose and inspiration of our system of government.

But if one individual in the republic should be thus upheld in civil rights, so, too, are the civil rights of all others to be equally respected. Hence no one may force his companionship upon others; nor compel a friendship, a marriage, or even a business intimacy, to please himself. If one may go by his own tastes, so may his neighbors by theirs. In associations for religious or secular purposes persons are left to their mutual arrangements, — one may cultivate or accept acquaintance, offer or seek patronage, invite customers, here and there, and the body politic will not assume to meddle. True, in a republic like ours, and especially among new surroundings where all is simple, a general recognition among neighbors may be looked for; and our institutions, both civil and political, discourage anything like permanent class conditions. Yet the commonwealth keeps within its proper bounds of influence or authority and leaves society to its natural flow. If in any respect America is to fail of her highest purpose hereafter, it will be mainly because of the immense accumulation of wealth which a few gain now-a-days in comparison

with the great majority. All legislation in a republic should by every wise indirect process, where it may not positively prescribe, counteract such tendencies as far as possible, so as to keep the fruits of exertion fairly distributed and to discourage luxury. It should sedulously avoid favoritism and partiality. Laws which tax successions, restrain entails and perpetuities, favor equal distribution among intestate kindred, rather than primogeniture or the preference of males to females in an inheritance, — all work legitimately in such direction. If shirtsleeves come back to shirtsleeves in a third generation, as the saying goes, it ought not to be because offspring in the second have been led to squander and dissipate, but because fortunes, though unimpaired in the aggregate, become minutely subdivided.

Maxims which catalogue and define one's civil rights abound, with others of a more political cast, in our State constitutions; some of the more important of them, such as were framed in "the old thirteen," having been later embodied in the constitution of the United States among the first ten amendments to which I have alluded. These provisions, once unionized, have been copied in turn by all our later States and in all our later State constitutions.

Out of the great mass of maxims thus offered, let us select for description some of the most pertinent and permanent. That no person shall be deprived of life, liberty or property "without due process of law" — this right has been so endeared and so familiarized that the prohibition as originally phrased in our fifth

amendment received the unique honor of a repetition verbatim in the fourteenth, as though to give double assurance to the people. "Due process of law" means the safeguard of one's individual rights in the respect stated from all public interference, aside from such correct and orderly proceedings, considerate of private right or immunity, as may have been imposed by what our English vernacular has long styled "the law of the land" — that is to say, a law sound in policy and basic principle, and operating upon all the community alike, without respect of persons. The close relation, in significance, of "due process of law" with "law of the land" — both Anglo-Saxon phrases time-honored and familiar, and both used with emphasis in the constitution of the United States — has long been conceded in British and American jurisprudence; and against all attempted favoritism whatsoever, all arbitrary or despotic use of sovereign process, — executive, judicial or legislative, — the individual may justly invoke such protection. ✓

Another comprehensive maxim which we find coupled with the foregoing, so as to make individual rights still more secure against sovereign caprice or an inconstant public, forbids that private property be taken for public use without just compensation. This means not recompense merely, but a just one, and such practically, in any last resort, as a tribunal unbiassed may upon due process of law and due investigation — with a jury intervention, it may be — deliberately award. We hear much proposal at the present day of the municipal or public ownership of utilities, of wresting railways or other vast moneyed concerns from the control of their corporate owners.

But through all such heated controversy let us bear in mind, as a broad principle to be fundamentally respected by nation, State or municipality, that the private property taken for any such public purpose must at all events be justly compensated; not compensation by any wilful or self-imposed standard of under-valuation by the purchasing public, whose temptation must often be to confiscate, misappropriate or destroy private property when passion is aroused; but on the whole a just compensation. If so wise and salutary a maxim has been a solid wall of defence to private ownership rights in times past, it is likely to prove a bulwark immeasurably needful in troublous times to come, if socialism gets rampant.¹ Private vested rights must be sacredly respected under any circumstances. It is for individualism, not communism nor imperialism, that our government stands, while such maxims endure; and our prosperity hitherto, as a people, is largely due to the assurance thus given that private enterprise shall hold its reward securely.

For a perpetual safeguard to personal liberty, the right of habeas corpus holds, both in England and America, an impressive prominence. Recognized,

¹ This prohibition was asserted in various State constitutions of the eighteenth century before the Federal constitution, by 1791, became amended in that respect; the Virginia bill of rights of 1776 leading off with a protest directed against all government exactions of an arbitrary nature. States to this day preserve that organic prohibition under one or another variation of expression. Thus Indiana announced by 1816 that a man's particular services; as well as his property, should not be taken from him without "just compensation"; while Ohio had earlier given to the phrase a novel turn from the standpoint of public advantage. For the right of eminent domain is essential to government. In other words, (to quote this Ohio constitution), private property shall always be subservient to the public welfare, provided just compensation be given. Corporate franchises and other incorporeal rights of property are here included.

though not originating, under Charles II in the famous act of 1679, this right has been claimed and highly prized by English freemen from the earliest known era of our law. Whether an individual's seizure and confinement be the act of sovereign authority — of a President, a governor or a legislature — or that simply of some other private individual, — whether the party aggrieved be an adult or of such tender age that some one else must intervene on his behalf, — the right exists as his, by virtue of such writ, to be brought before a common-law court for a summary hearing; and if found illegally detained of his liberty, the prisoner must at once be set free or remitted to a rightful custody. Of such vital consequence to the individual is habeas corpus in a commonwealth that some of our States concede the right without qualification; but our Federal constitution provides, as also does English statute law, that in great exigencies of public danger, external or internal, a suspension of this writ may be allowed to a certain extent. "Unless when in cases of rebellion or invasion the public safety may require it," is the careful reservation here expressed, thus recognizing the right as legally unimpaired so long at all events as society is in its normal condition and the public safe. Under United States jurisdiction the permitted suspension of habeas corpus rests ultimately with the legislature. But Congress may not be in session nor capable of acting promptly and efficiently at the moment of danger; hence public emergencies arise where the President, as chief executive, as civil and military head, as guardian of the public safety, may himself judge of the exigency and suspend the writ; but subject, nevertheless, to the controlling direction,

the approval or disapproval of Congress upon opportunity later. But such executive discretion was challenged and protested against during our Civil War by Chief-Justice Taney and others; notwithstanding which, President Lincoln claimed steadily and repeatedly exercised that right, even after Congress had partially defined the general limits of a legal suspension; and this he did upon his own solemn responsibility, while Congress was not in session, claiming that a still greater exigency had arisen than Congress had already provided for.

Against "unreasonable searches and seizures" our people are secured; hence the old poaching and prying wholesale "writs of assistance" of colonial times are forbidden, and only sworn search-warrants can be allowed operation which furnish particular description.

Other civil rights of the individual upon which governments, State and national, much insist concern the usual administration of justice in the courts. Thus is it, most of all, with criminal prosecutions; for here, as Virginia's bill of rights led in pronouncing in 1776, one has a right to know the cause and nature of his accusation, to be confronted with the witnesses and accusers, to call for evidence in his favor, and to be tried by an impartial jury of the vicinage, without whose unanimous consent he cannot be found guilty; nor ought one to be compelled to give evidence against himself. Our Federal constitution insists, besides, that presentment must be made by a grand jury for any capital or other infamous crime; that no person shall be twice put in jeopardy of life and limb for the

same offence; that the accused shall have a right to a speedy and public trial; that compulsory process shall issue in aid of the testimony on his behalf; and that at the public cost, if need be, he shall have the assistance of counsel.^{*} Such American rules are fairly fundamental.

Trial by an impartial jury of the vicinage or neighborhood, whose verdict must be unanimous to take effect, has been deemed a precious right in all criminal procedure. "Even in civil suits," adds the Virginia bill of rights, "the ancient trial by jury is the preferable mode, and ought to be held sacred;" but on this latter point American practice yields somewhat to the mutual wishes of litigants. "Jury trials may be waived by agreement" is the modern proviso of most States in controversies purely civil, so that parties may let the judge himself decide; and other experimental changes are seen here and there, — as in dispensing with unanimous civil verdicts, or in permitting civil juries to be composed of less than twelve men. For jurymen in awarding civil damages are liable to be led astray by prejudice or sympathy; and their usual bias is against the rich and powerful and especially all corporate defendants. To secure impartial justice upon the facts in litigation, then, an honest judge or referee may often be better trusted, as well as for sifting the testimony where civil issues are complicated. But in criminal cases, on the other hand, where life or liberty of the person is in jeopardy, trial by a jury of one's peers must ever be a strong reliance for the accused, and in some States juries have here an express right "to determine both the law and the facts" or even to fix the penalty, so that

^{*} Amendments V, VI.

the fate of the party arraigned shall depend wholly upon their verdict. No government can have its arbitrary way in prosecutions, so long as honest juries from the people are impaneled to decide "guilty or not guilty."

Excessive bail is commonly prohibited, likewise the infliction of cruel or unusual punishments. Hence malicious annoyance in causing arrest is hindered, on the one hand, and brutal infliction of the law's penalty on the other. What is a "cruel or unusual" punishment, however, in one age may not be in another, and the fact that some new mode is introduced does not condemn it as "unusual" if it be humane and deserves to come into use. "Cruel" and "unusual" are words inseparable here in a rational sense. Instruments of ignominious discipline for petty criminals, once familiar both here and in England in the Revolutionary age, have mostly disappeared and might now be thought unusual, such as the stocks, the pillory and the whipping post. Men are no longer maimed, cropped and branded for crimes, as formerly; nor does the culprit swing from the gallows, as was once the case, for stealing, robbing, counterfeiting or for any other crime of which he was adjudged guilty, short of murder in the first degree.¹ The gallows itself, which took the place of beheading upon the block, is already yielding to the less painful infliction of electrocution in a chair; and electrocution, as courts have decided, is not to be forbidden as a "cruel or unusual punishment" prohibited under that phrase. That old *lex talionis* — "an eye for an eye and a tooth for a tooth" — may

¹ Even treason against the United States may now, under a statute, be punished at discretion by mere imprisonment.

well be thought barbarous and obsolete to-day; yet to me it seems that the other mandate "whoso sheddeth man's blood by man shall his blood be shed" is lastingly just and applicable. When men become humane enough not to slay or shoot down their fellow men in cold blood this death penalty will disappear without repeal or amendment in the code; but society meanwhile has neither adequate protection nor an adequate penalty without it. The cruelty lies in the individual who has provoked such punishment.

We may well, however, confine this most solemn expiation to the crime of crimes, leaving imprisonment for a longer or shorter term and the imposition of fines and penalties to comprehend all other retribution. Imprisonment itself, under present conditions, humane and sanitary, is far less terrible to endure than in the days of our forefathers. More than a century ago American States led the world in abolishing imprisonment for debt; while in reformation of the criminal, as an incident of his confinement, Pennsylvania set the first real example which impressed civilized society abroad. Enlightenment is the aim of all penal study at the present day; for, as New Hampshire's constitution of 1783 so quaintly suggests, the true design of all punishments is "to reform, not to exterminate mankind."

Our fundamental law further forbids "excessive fines." One would think that a fine of twenty-nine million dollars, such as a United States judge lately imposed, was excessive, if excessiveness can be predicated at all. An appeal is pending from that fine;

and, of course, in any case "excessive" is a relative term and the wealth of the culprit should be considered, as also the heinousness of the offence. But because Standard Oil magnates are rich and may have built up a business monopoly, through the long lapse of years, while ruining their competitors, are we justified in carrying such a penalty beyond the actual offence for which they are indicted and found guilty? Or can confiscation even of predatory wealth be lawfully upheld, to please the populace, because a guilty acceptance of railway rebates, shown in one course of dealing, is assumed by the judge who fixes the penalty to have been incident to other and earlier dealings? Nor is this the whole of it. The present fine is imposed, not upon the magnates, the directorate, alone, and still less upon single individuals of the management to whom guilt or a guilty knowledge is brought home, but upon the whole corporation of which they are members and managers — upon thousands of small stockholders and investors throughout the country, known to be innocent of wrong, as well as upon the few who have grown enormously rich in the concern. Can a corporation, as such, be rightly regarded as a criminal? A fictitious criminal, it may be contended, commits but a fictitious crime. And is it not rather those directing operations who themselves commit the crime? It is true that they who hold shares are somewhat in the position of principals in a pursuit whose directors are their accredited agents, and hence might fairly lose proportionally as well as profit through their agents' discretionary conduct of the enterprise. And hence it might be said that other private parties, aggrieved in transactions with the

directors, should have just recourse against principals, or at least be indemnified from the capital stock. But there can be no agency at law to do a private wrong, far less to commit a crime; and bleeding all stockholders, upon a corporate indictment, because of the guilty misdeeds of certain of their number in authority, presents a new phase in criminal jurisprudence. More than this, creditors of the corporation are thus struck at, if not the public, who may be left to indemnify from a rise in rates. Even if we admit that government may fine thus wholesale, within fundamental law, and that for practical example it should choose such a course with rich corporations, such fines do not alleviate the distress of third persons who claim to have been wronged directly by the malefactions of a directorate; and hence huge sums procured by way of penal exaction and turned into the public treasury virtually donate to the whole people that recompense which should rather have gone to aggrieved individuals and may yet be specially sued for besides in the civil courts.

Some of the safeguards which I have cited for a person's protection against public prosecution heed too much the individual and too little the general welfare. Justice should not be baffled. The true end of all criminal procedure is to protect the innocent, expose the guilty to righteous punishment, and conserve the safety of society. Mr. Trevelyan, in his *History of England under the Stuarts*, writes of those times that "anxious lest the law should lose its terrors, the courts, with the approval of society, retained rules framed to secure the conviction of the

guilty rather than the safety of the innocent." ¹ Conviction of the guilty and the safety of the innocent should be objects coordinate and tantamount in government; but the fathers of our Republic, aiming their corrective chiefly to this latter end, may perhaps have too lightly regarded the former. For they themselves were as defendants, justifying their popular cause against a sovereign. While we now concede to the prisoner counsel and the fullest opportunity to confront accusing witnesses and to know the nature of the accusation brought against him, are we not too prompt and zealous in shielding him against the possibility of criminating himself? We have long boasted that it is better for nine guilty men to escape than that one innocent man should suffer; and yet I dare affirm that any judicial administration which suffers nine out of ten of its criminals to evade the penalty of their misdeeds must be grossly culpable in its duty towards society at large. Justice by all who are governed should be attempted, and such justice is impossible when we screen the guilty or refuse altogether to ask questions of a suspected person. The parent or school teacher who investigates an offence committed puts the child concerned upon inquiry; and we are taught to believe that at heaven's tribunal hereafter every one will be called to answer out of his own mouth for his course in life. Why, then, should so simple a process be thought inapt for the courts in human inquisition, where the interests of the community demand that the actual truth be ascertained? The man who knows whether he is guilty or not of an accusation is the prisoner at the bar; if innocent he can hardly

¹ Sec. 11.

fail to establish his innocence by telling freely his own story; but if guilty, society gains rather than loses when a culprit stands revealed by his confession or by the grossness of his false denial.

It was reaction against the torturing inquisition of darker centuries, with its rack and thumb-screw, or, perhaps, besides, the dread of political prosecution at the instance of our pre-determined monarch, that set our ancestors so strongly to contriving such constraints upon the courts. For when America was first settled, a person arraigned for trial in England was examined by the court, and the examination, though confirming his guilt, if he were guilty, helped clear him if he was innocent. On the European continent, — in France and Germany for instance, — we find the older rule in accepted vogue to this day: and one who reads the ingenious detective stories of Gaboriau, sees French magistrates of expertness and integrity conducting a preliminary investigation, in cases of criminal arrest, whose result may be, where the prisoner explains the circumstances which brought him into suspicious relation with the crime committed, to set him free without publicity or formal trial. The shield which would here seem suitable and sufficient is that of immunity from prosecution or exposure for other offences which his testimony, frankly given, might establish against him, and his statement might be taken behind closed doors.

In one respect the inaptness of our law, as favored at the outset in such connection, has been largely overcome. I refer to that old rule of evidence, whereby the prisoner arraigned was unable to testify even though he wished to, and where interested

parties generally were excluded from the witness stand. How contrary to the true sequence of facts must have proceeded many a trial, in those times, when investigation had to reach conclusions wholly upon the drift of such testimony from outside as might portray the situation. I cannot forget the first case I ever conducted as a member of the bar, when, forty years ago, an humble but intelligent and thoroughly honest man, employed in a public office at a time of great pressure and distraction, was betrayed by kind feeling though folly into helping some stray soldiers collect forged checks which he supposed were genuine. After they had vanished he was hauled before the court as the culprit, when only their credulous tool. His story, as he told it privately, satisfied his employer and all who knew him, that he was innocent of criminal intent, and had not appropriated the money; but to repeat that story before jury, judge, or magistrate, on his trial, was impossible, as the law then stood, while the production of witnesses on his behalf, except for good character and credibility, was equally out of the question. Nothing could counsel avail against incriminating facts, except to use his story as a sort of hypothesis in the closing argument and then appeal to the compassion of the jurymen. Two disagreements ended the case and saved the accused from imprisonment; he returned to his former post; and society gained in him for the rest of his long life a useful member who lived down odium and gained withal in discretion.

At this later day such a prisoner would be free to take the stand when he wished to do so; and I am well convinced that society is safer for the change. Nor as to the culprit whose heart tells him that he is

guilty of the charge for which he is placed on trial, do I feel the compassion of that argument, which conservatism still sets up against the statute change, that condemnation might follow a prisoner's prudent silence. One need not, to be sure, take the stand, and a court may warn the jury not to allow their minds to be prejudiced because he fails to do so. But for my own part, I am willing that any jury should conceive a prejudice against a prisoner who remains mute.

In a recent murder trial of great public interest the prisoner took full advantage of a statute which allowed him to put the whole cost of his counsel and witnesses upon the government; and this, with charges extraordinary for experts and counter-experts, imposed a heavy tax upon the county. In fact, the burdensome expense in these days of prosecuting certain criminals, with its hazard of results, clogs justice often in many a rural venue, whose inhabitants are too poor to bear the weight. So common, too, has become the practice among defendants who can raise the funds, of carrying frivolous exceptions and appeals to higher tribunals that years may elapse before a criminal meets his just deserts, and the lesson of conviction will meanwhile be lost.

All resistance unduly protracted is a public injury. The courts, more especially in our criminal administration, should be prompt, sure, irresistible; and they who bear the sword of justice should not bear it in vain. The safeguards of innocence are ample in any case; and if clemency or pardon be fit for one adjudged guilty, the executive can intervene. Delayed trials, mistrials and new trials, appeals from

State to the United States courts, political pressure upon President or Governor — all drive a crime-ridden community towards desperate measures. Greatly as we should condemn lynch law, there is this at least to be said for it: that it originates not so often in the spirit of wanton mischief as in the deep determination of a community to uphold the law's righteous penalty against criminal aggression, when courts and the civil authorities are thought too weak or too corrupt to fulfil their duty. It is, after all, local self-government maintaining itself turbulently, as in the days of our forefathers and the Stamp Act. And in trials by such lynchers or vigilance committees, however summary may be their infliction, it has almost invariably proved that the person arraigned has found a tongue to give convincing proof of his guilt or innocence, and that, if really innocent, he escapes the threatened punishment.

CHAPTER IV

POLITICAL RIGHTS

TO consider now one's political rights in organized society. The distinction of civil and political rights cannot be precisely applied or insisted upon, since the maxims of government blend somewhat in force and expression without preserving a clear difference. Yet there is a difference and we may thus undertake to define it: civil rights proper consist of the fundamental rights of human nature as applied in organized society or a commonwealth; while political rights are such rather as the commonwealth or sovereignty chooses to confer by lawful enactment upon all or certain of its inhabitants by way of a direct participation in the conduct of the government. Thus, whatever concerns one's rightful immunity and protection in respect of life, liberty or property within the jurisdiction is a civil right; while the right to vote or hold public office is purely political and liable under any government to qualification in respect of the inhabitants.

And yet with us of America, such a distinction becomes obscured by the fact that sovereignty itself is derived from the whole people; and hence some would broaden the term "American citizen" so as to signify one of our sovereign people, — a constituent

member of the sovereignty which is synonymous with the people. Yet "citizen," in its literal sense, has a more technical and political application, as meaning only those native-born or naturalized among the people, including men, women and children; while, as I have contended, rights purely civil are generously extended by our fundamental law so as to comprehend "all persons" or "the people." Not so, however, with purely political rights, which to this day apply with admitted qualifications and cannot be extended in any jurisdiction without some constitutional change or a valid act of the legislature.

To take the term "citizen" in its most appropriate political aspect, the application is a limited one. Citizens of the United States are citizens, besides, of the State in which they reside; and before the constitution of the United States was adopted at all, each State independently had the right to make citizens of such persons as it pleased. Something of a privilege attaches universally to the condition of citizenship. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof" is now the fundamental condition of American citizenship; and, although the accident of native birth should fulfil that condition with a vast number of our inhabitants, those foreign-born become citizens only through the process of naturalization. Our naturalization laws, moreover, may vary from time to time, at the discretion of Congress, in making a probationary residence longer or shorter, or by imposing other special conditions. With the latter class of inhabitants, at all events, citizenship is seen

to be something of a political privilege or boon bestowed by government; and such has been the fundamental theory of all citizenship. But accepting the difficulty of defining closely what constitutes citizenship in a republic, our courts have sometimes held that a person may be a citizen for certain purposes and yet not so for others.

First, and most emphatically, we realize the full significance of citizenship in our international controversies. Here only the real citizen of a country can demand and rightfully expect the intervention of its government on his behalf, to protect him against another government for infraction of his rights in life, liberty or property. For that civil protection which the United States so amply guarantees to "all persons" or "the people" — regardless, it may be, of a strict citizenship — is presumably confined to its domestic jurisdiction. And, corresponding everywhere to the right of international solicitude which a full citizen may properly expect, his first and most comprehensive duty is loyalty or allegiance to his own government. Every one born into the world is regarded as a subject or citizen of some government, as well as domiciled somewhere; and the presumption arises that each of us owes loyalty or allegiance to the government within whose jurisdiction he was born. In former eras so strongly was such a presumption insisted upon, under the law of nations, that each European sovereignty treated all those born under its flag and dominion as bound to a life-long allegiance, regardless of all personal change of residence or of actual intent to expatriate one's self; but this rule weakened in force with the increasing settlement of a new continent and the emigration

from old-world countries of men seeking to found here new homes and new institutions.

As colonists restive and rebellious against the rule of the mother country, America's leaders of the eighteenth century contended that the old doctrine of a perpetual allegiance due by the mere accident of birth was slavish and absurd, and that something was in reason due to one's own voluntary choice of a home and country. Great Britain held in those days to the contrary; and only her recognition of the United States as an independent people after we had fought and conquered gave us before the world a place in the family of nations and the indisputable title to a new and transferred allegiance. Even then England maintained her claim of a right to search and to impress her native seamen; and a second war growing out of our resistance to such an assumption and its offensive exercise, that secondary claim was put finally to rest only by England's silent cessation to search or impress where our flag protected on sea or land, leaving new and enlightened influences to work out later a practical extinction. Individuals are found to-day free to change both domicile and citizenship to a considerable extent and to assume at will new duties of loyalty and allegiance with a transfer of abode, repudiating all obligations to the government beneath whose flag and sovereignty they happened to be born, and adopting by deliberate choice new ties and a new national relation. Laws and treaties work out such international results harmoniously.

But in this broad relation of citizen or subject, one claims political rights and immunities from his

government in return for his bounden duty of service in allegiance. And among such rights and immunities we may fairly class as political, considering their scope, our constitutional prohibition to Congress from "abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Freedom of speech or of the press, — freedom to criticize with honest candor the operations of state and the conduct of those at the head of affairs — has proved a salutary blessing. How great our liberty in that respect is seen even at this late day, when we find autocratic Russia, forced by her own necessities to yield somewhat to the people in that direction. Our early colonial newspapers were sometimes suppressed or disciplined by royal governors, in order to keep down all adverse comment upon the course of rulers; and men were arrested and thrown into jail for speaking or printing their own opinions upon issues of the day. Even freedom of speech in a legislature had hardly been tolerated; and hence, following English legislation in 1689 on behalf of Parliament, Maryland pressed early in her Declaration of Rights (1776) the immunity of representatives in that respect. And so, later, with our other States. In published writings, the old common law of libel was a hindrance of popular censure; for the greater the truth, as paradoxically expounded, the greater the libel; and of all libels, that upon the public and public officials has ever been the most stigmatized. But early in the nineteenth century, New York and other leading States instituted that admirable change which allowed truth as to alleged facts an

admissible defence in libel suits. Malicious motive, however, as among individuals, or the wanton purpose of breaking down legitimate authority and fostering anarchy and disorder, qualify the right of free speech or a free press in every age or country.

The right of the people peaceably to assemble, and to petition the government for a redress of grievances, is a political right which rulers must regard. A combined assertion of popular rights on occasion, or a combined opposition to particular public measures, must ever be more formidable and impressive than that of scattered individuals. To such an assembling of minorities as well as of the majority, whether under party auspices or otherwise, this country has been long accustomed. But the right as here expressed is freely accorded to peaceable assemblies alone and to respectful addresses made to the government. No threatening demonstration, no offered violence to authorities at the capital, is here upheld or justified; nor can the marching of a mob be tolerated to overawe and intimidate, — as where mutineers from our Revolutionary army once threatened the Continental Congress at Philadelphia, demanding their pay. To petition, moreover, is not to demand, but to ask deferentially. With the right to peaceably assemble goes that of instructing representatives and consulting together upon the common good.

Such fundamental prohibitions under our Federal constitution, as amended, followed a rule already declared in separate State jurisdictions. In the by-gone era of anti-slavery agitation, John Quincy Adams, while serving in his old age at Washington in the House of Representatives, contended most

forcibly for the people's right of petition to Congress, even though it were to the extent of praying respectfully for a peaceable dissolution of the Union.

Local self-government, under the autonomy of States, is a constitutional right still cherished. Hence the preference shown in all our fundamental instruments for local police and a local militia to maintain domestic order, rather than for standing armies of the whole nation. Such preferences hold fairly to this day, under the Federal Constitution itself, notwithstanding the immense prestige gained historically by the army and navy of the Union. So, too, a volunteer soldiery, rather than that of conscripts, has been our main and usual reliance.

The offence of attempting to overthrow the government to whom one owes allegiance as citizen or subject is treason; and the treatment of treason or "high treason," as a crime, has changed much in the course of centuries. What one denounces as treason, at some historical crisis, another glories in as exalted patriotism. "Rebellion against tyrants," to cite John Bradshaw's epitaph, "is obedience to God." In European countries treason was long regarded from the standpoint of disloyalty to the person of the ruler, and kings or high nobles wreaked vengeance upon some recreant follower as a traitor, less from regard to the public injury than their own offended dignity. But with us of America, personal considerations of sovereignty carry little weight. The office, not the man, is supremely sacred; no one rules but in the name and at the behest of the governed under its legitimate sanction. Hence treason here, as a crime,

is regarded rather as an offence against the whole people, against the republic, against the general safety, than against the chief magistrate who happens at the time to be vested with delegated authority; nor can constructive treason on doubtful grounds be set up by any one in official station to gratify a personal revenge. Bills of attainder are forbidden. Each person accused must be judicially tried under the law's favoring requirements as to the evidence of his guilt. There may be treason against a State or treason against the United States; but the test comes mostly to a national criterion. Treason, as against the Union, is defined as consisting not in mere conspiracy but only in levying actual war or adhering to enemies. Nor can punishment for such treason carry corruption of blood, so as to extend the penalty to innocent offspring. Yet, whatever may be the justice or injustice of a cause which leads men to rise against legitimate government, success alone can relieve them from the stigma of traitors or from a criminal liability within the limits I have stated, short of sovereign clemency.

The criminal offence of treason, though heinous surely under a clear condition of facts, is one of the most difficult to calmly adjudicate or discern in any body politic. Judges themselves, however carefully selected, are susceptible, like the rest of us, to political bias; and so, most emphatically, must be juries composed of rational and intelligent citizens who keep in touch with passing politics. King Log alone in such a controversy might administer justice dispassionately.

The excesses committed in England during the period of her Commonwealth and under the two

reactionary reigns which followed, were not witnessed greatly when our own Civil War ended, forty years and more ago. Summary retribution was, indeed, visited upon conspirators implicated in President Lincoln's assassination, and had not a court martial been resorted to, — possibly without strict warrant of law, — so as to deprive such prisoners of a jury trial under the usual safeguards, the punishment imposed could never have been inflicted. With a few such vindictive examples, however, the victors' glut for revenge was satisfied. All attempt to deprive the Lee inheritors of their Arlington estate, by converting that home into a soldiers' cemetery, ended in a national purchase to clear the title. The court-martial of civilians ceased in normal jurisdictions; our supreme court sustaining each individual of a pacified union in his constitutional rights. And though some leaders and promoters of the vanquished Confederacy were for a time imprisoned, all prosecutions for treason dropped without reaching a trial and all deprived of liberty soon went free. A generous amnesty was extended. "Do not try Jefferson Davis by a court-martial, but, if at all, in the regular way," was the early advice given President Johnson in 1865 by a party adviser. And we see among that President's posthumous manuscripts now in the Library of Congress, a letter received, that year, from a venerable Whig of by-gone days,¹ once in Zachary Taylor's cabinet, which urged the liberal bestowal of pardons upon leaders like Stephens, Campbell and Benjamin H. Hill; and that the manacles of the Southern Confederacy's late President be taken off. "These incidents," he added, "belong to history."

¹ Hon. Thomas Ewing of Ohio. .

So much, then, for the political rights of an American simply as a citizen or subject under government, as our fundamental law regards them. Those political rights which involve, besides, a responsible participation in affairs consist mainly in (1) the right to hold office, and (2) the right to vote. In the former respect, our commonwealths reached largely their several standards in colonial times; yet, save for the mere town and county offices, with a representative, besides, in some colonial House of Commons, the honor and emoluments of public station were mostly in that era the gift of the Crown. They whom England sent over to govern our several colonies varied greatly in merit and character, as rulers always will in the administration of distant dependencies. Some were in touch with colonial sentiment; more were not. Some showed themselves worthy of their selection, while others proved profligate or incapable, — the castaways of influential families in the mother country bound to provide them a living. Under no system of paternal rule may we expect high effort from exiles of the home dominion; they take no profound interest in their immediate work or surroundings; they come and they go, and the best of such foreign endeavor will scarcely better the selection or restrain incumbents from vice and peculation. For good government is the natural product of the vicinage — of local ambitions, local family ties, the local wish of the individual placed in authority to serve his neighbors, his equals, his fellow-citizens.

The American idea, rooted in Revolution, identifies public office closely with devotion to the public welfare, and the people are pronounced the true

source of patronage. Our Federal constitution, while requiring all high officers or legislators to take oath or affirmation to support this instrument, ignores religious tests for office, and all former qualifications of property. It was a great advance on former example, and such has now become the general rule for state as well as nation. But concerning other qualifications for office-holding, some prohibitions have always been imposed and still apply. Thus, to this day, we find high stations to which no one is eligible at all until a stated age is reached, later than a mere majority, so as to give assurance to the people that his capacity has ripened by experience.¹ Length of local residence affords another test of the right to be chosen or appointed to represent in certain cases. And, moreover, one cannot be President of the United States, nor even a governor as some States set the rule, unless native born, and resident besides for a specified time.

Rotation in office is procured by fundamental provisions which prescribe the length of an official term and declare the incumbent ineligible after a certain period. Re-eligibility as governor was restrained under several State instruments of early date; yet only partially, and so that one might be re-elected for a certain number of terms out of some longer specific period, or else after the expiration of some stated years in retirement. Provisions making one absolutely ineligible, apart from such restrictions, are abnormal in our system if they exist at all. For a President of the United States, as we all know, long

¹ For instance, our Federal constitution makes ineligible to Congress as a Representative one less than twenty-five years of age; or as a Senator one under thirty; and no one can lawfully be chosen President of the United States before reaching the age of thirty-five.

custom alone fixes the final limit of successive terms. And on the whole, a governor's official tenure is longer usually, at the present day, than it was when our thirteen States declared their independence, and annual elections were the custom.

I come now to the right of suffrage, which, in most respects, is left wholly to separate State discretion. Of all political rights or duties inherent in a free people, that of voting is the most sacred, comprehensive and fundamental. "All elections ought to be free;" and under our American system this right of electing applies most liberally. While, at the outset of independence, property requirements of some sort limited almost everywhere the right to vote, the rule is now that, whether taxed or untaxed, whether rich or poor, whether high or low, the equal poll of an adult citizen and resident must be respected. Nor do religious views affect the right as formerly. There are States which give the ballot to women; and even genuine residents of foreign birth not yet fully naturalized are qualified under some local laws. Special discriminations, however, we find separately ordained. Thus, in Massachusetts, illiteracy disqualifies; and such a test when fairly and accurately applied seems not unfair in any commonwealth which gives education freely and encourages every one to read and write. Those convicted of such infamous crimes as bribery or false personation are also forbidden to vote, and disfranchisement may extend even to those innocent enough, who are kept at asylums or prisons at the public cost and hence are not self-respecting and independent.

Aside from racial troubles which I shall not here touch upon, the severest test upon broad manhood suffrage, for the taxed and untaxed alike, comes in those conglomerate centres of to-day whither swarm so many of the ignorant, idle and shiftless, whose ballots, when cunningly combined, may outnumber those cast by their intelligent and responsible fellow-citizens who have a direct stake in the wise and economical administration of affairs. For the untaxed in our great cities greatly outnumber the tax-paying inhabitants. This is a practical difficulty to which practical citizens are now giving attention and of which I shall discourse in a later chapter. Rich and poor will generally cooperate as equally good citizens when the local public spirit is aroused; and if each civic treasury should be guarded against the sturdy beggars who crowd at the spigot, even more must it withstand those prowling promoters of predatory schemes who assault the bung-hole. We must still stand to the end, I presume, upon liberal self-government and voting by the people. Even in a business corporation, the law does not undertake that each stockholder shall cast a single vote and no more, simply because he is a stockholder, and were resident tax-payers alone to poll ballots in our cities voters would not logically stand alike in their suffrage and the non-resident who is taxed on local real estate might well complain of his utter exclusion.

In the public opportunities for exercising a choice, our elective franchise has made great progress since this government began. Local self-government is still secure, and more than ever do local incumbents, town, county and even State, hold title as the gift of the people. Instead, too, of choosing members of a

single representative assembly, as formerly, the mass of voters in each State become electors, on a census rule by numbers, to both Senate and House of Representatives. The march of our democracy to power proves thus far irresistible, and the home government which now impends in the world's progress is that of an honest and intelligent public opinion, guided by facts and argument. This is the government, and the only kind, worth living under, so long as class tyranny of every kind can be kept down

But a government which yields to popular direction no more than the choice among representative candidates must be after all an imperfect one, even when candidates themselves — as seldom happens — are brought freely forward by the people at their own instance. The time, I trust, approaches when a highly patriotic and intelligent people may well demand their own more immediate participation in affairs. And in the people's initiative or referendum looms up for the future an engine for popular rule of splendid possibilities. Local statutes have, of late, in various scattered instances, been referred to a popular vote for final sanction. A special referendum long ago availed in the States where a new constitution or a constitutional amendment was submitted to the voters for approval and adopted upon their suffrage; and in many such instruments, for more than half a century, the legislature itself, with the people's agents in other branches of the government, is fundamentally constrained in the abuse of power. Hence a referendum of regular

establishment is no pure novelty in State government. Initiative by the people is also practicable; and this should mean something more than a mere petition to representatives. But for referendum or initiative nationally applied the conditions are unfavorable.

In these days we worship no human ruler; we believe in our own capacity to direct affairs. Though adaptation of New England's town meeting to large cities and commonwealths has been thought impracticable — and I myself think it quite unfitted to this Union at large — something of its methods and basic idea may be found to consist with an expansive experiment in democracy like ours by the time that the great mass of society are well grounded and assured in those elementary principles that make civil government a common concern. Only arouse an intelligent community to its pressing needs, even now, and the situation is well handled. To expert knowledge a whole people cannot lay claim; the capacity to administer well may belong to but few comparatively among us; yet virtue and high purpose go with the common sense, to supervise and hold all chief officials to right conduct and to establish the policy desirable.

Finally, we should not omit religion, in enumerating the rights of mankind for which the founders of our republic contended. This may be pronounced a natural right, so far as concerns one's private worship of the Almighty; or a civil right, when viewed in the social aspect of church fellowship and communion; or once more, a political right, from the

standpoint of a state establishment or when considering such religious tests as we formerly applied to office-holding and the right to vote.

The two great reforms in which the United States has here set an example to the world are: (1) in tolerating all religious sects and denominations and in conceding to every one the right to worship according to the dictate of conscience; (2) in prohibiting public establishments of religion and remitting all sects, all churches alike, to the voluntary support of adherents. How novel still in the world's experience is this latter change we are reminded, at this day, by seeing the French Republic enter with difficulty upon a like experiment, while Europe views largely the innovation with anxious distrust. As to ourselves, religion has not suffered from disunion, or rather the non-union, of church and state, for in the stimulated exertion of proselyting sects, all legally alike, gifts and individual efforts of the faithful have stirred an increasing activity such as no tax-supported establishment could probably have afforded. The danger lies, perhaps, in secularizing too greatly the education of the young — school and home each shirking its initial responsibility in that respect. Yet America, despite those heterogeneous foreign elements which have joined her original population, heeds still the Christian character of her settlement. To turn back in our religious policy and cease to tolerate, seems impossible. To tolerate is not necessarily to become apostate ourselves. We must go forward and look forward, and our hope should be that freedom in religion, or even in non-religion, will lead ultimately to sound and firm convictions in the best religion. We tolerate; but where imposture

pretends to religion we may well demur; and any establishment which, like Mormonism, has sought to make a religion of immoral practices or to control civil affairs by a hierarchy hostile to republican institutions, is liable to repression. No one exercise of religion should be permitted to interfere with other rights of exercise in the community.

CHAPTER V

GOVERNMENT BY CONSENT

THE fundamental basis upon which should rest the fabric of human authority in any land is, in our American conception, the free consent of the governed. And proceeding from its postulate of the equal creation of mankind, and of the equal endowment of "unalienable rights" by the Creator, our Declaration of 1776 next asserts that "to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

Governments are many on this earth and independent; and when we consider all the types and varieties of the human race, we cannot conclude it possible or even desirable for man's advancement that one political jurisdiction should embrace and monopolize or even give the pattern to all earthly authority. God's will alone asserts a rightful dominion over the world, and, whenever that will controls finally by the consent of all mankind, human government need exist no longer. For law itself is but a schoolmaster, and the perfect law is liberty. From such a point of view, is there anything in human sovereignty which should call forth a blind idolatry or the self-immolation of those who live under it? Pumps, triumphal processions, overbear the public mind. Government is, most of all, designed as a

means of security to the inhabitants. Its first and fundamental purpose is, when individuals mingle together in society as mutual tastes and inclinations lead them to do, to safeguard the rights of each and all of them. For fostering industrial pursuits, developing wealth, promoting the arts and what we call civilization; for establishing wise institutions in religion, learning and philanthropy, and for increasing the welfare and happiness of the general mass, government operation is but secondary. Citizens naturally take the initiative themselves in such matters. Society should, in as free and unfettered intercourse as possible, shape out its own essential ends, each inhabitant pursuing his personal career; and wherever government intervenes to direct and promote, it should be heedful to do so without favoritism or partiality. Government collects an annual revenue for the public needs and spends it annually: it seldom carries on a business.

In short, as America views the true function of such establishment, a state should be rich only in the aggregate wealth of inhabitants who have fairly availed themselves of its liberal opportunities; it should be strong chiefly in the high intelligence, health and virtue of those who grow up therein with hearts devoted to its defence and maintenance. Better than all fleets and standing armies, for internal discipline or for defiance of foreign foes, the love of country, inspired by equal laws, makes and keeps that country safe.

Each government originates justly in a fundamental compact of some kind, involving the mutual consent of those subjecting themselves to its direction. The idea of government by consent is a great

advance upon that older theory of government by the coercive authority of a few privileged and powerful men. But inasmuch as social unanimity in a compact of government must be found impracticable, the consent of the greater part, or a majority, may properly bind the rest to such an institution, and to details and methods; unless, at all events, they who are dissatisfied withdraw promptly from the new jurisdiction and remain outside, in token of their positive dissent or refusal to part with their original liberty on such terms. Remaining, they should yield to the majority or persuade others until they themselves have gained the majority.

A commonwealth or state has been well defined as a body politic or civil society of men, united together to promote their mutual safety and prosperity by means of their union.¹ And the constitution of our United States, which was framed and adopted by way of a solemn compact and ordinance both of the several States and of the people composing them, thus sets forth in its preamble the proper basic objects of a political union: "to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Such are and should always be the prime objects proposed whenever men come together to form a new or a more perfect body politic. And it is a wise preliminary to all ordained government by compact, that the instrument itself, as drawn out in detail, by representatives of the people who first assemble in convention to frame it, should not only be signed on behalf of constituents by those em-

¹ Boston Resolutions 1772, citing Locke and Vattel.

powered to act in the premises, but should afterwards be submitted in the text for adoption to the constituencies themselves or to conventions or legislatures duly authorized. This was done with the constitution of the United States and with the best of our written State constitutions.

As to what John Locke in his treatise on civil government terms "political power" — or where each member "hath quitted natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it" — such society, he argues, is instituted to carry out the idea for a commonwealth which man naturally undertakes for himself, but is not competent to execute as numbers increase. For man's individual birth-right is the inherent power to preserve his life, liberty and estate "against all injury and the attempts of all other men, and to punish violators; while political society carries out the same idea for a state."¹

No sovereign authority over the lives and fortunes of a people can ever gain a rightful sway or progression except through the voluntary acquiescence and consent of a people, tacit if not expressed, and under circumstances which evince a continuous and orderly establishment. No collective society can cohere without government, without a public supervision of some sort, without an individual submission to laws and an organized supremacy. Yet "all government," to quote from Maryland's Revolutionary declara-

¹ Locke § 124.



tion, "originates of right from the people and is founded in compact only." And the Massachusetts constitution of 1780 elaborates the argument in its preamble: "The end of all government is the benefit of the body politic; and the body politic is formed by the voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."

When men thus voluntarily enter into political society, they have a right to prescribe their own fundamental terms and conditions.¹ But the liberty of men under government becomes a modified one; their freedom here is to have a standing rule to live by, common to every one in that society and duly made and duly enforced by the sovereign authority therein erected — "a liberty," says Locke, "in all matters where the rule prescribes not."² Furthermore, by implication if not expressly, one's own right, particularly in property or personal relation, is here harmonized by intent with the rights of all others embraced under the compact; and hence each consents to a judge or arbiter of rights as between himself and his fellow-members of the jurisdiction. But one does not thereby renounce altogether his original and inherent rights, nor surrender himself abjectly to arbitrary rule.³ Any such claim would be absurd; since the chief end of government is to support, protect and defend those very rights.⁴ Some of our Revolutionary fathers

¹ Boston Resolutions 1772.

² Locke § 22.

³ Boston Resolutions 1772. ⁴ *Ib.*

contended at the outset that man could not validly renounce such rights, inasmuch as they are the gift of God; but perhaps it is enough to say that, alienable or unalienable, no such intended renunciation can be inferred upon doubtful evidence of one's intent.

In short, to quote the Boston Resolutions of 1772, "the natural liberty of man by entering into [political] society is abridged or restrained so far as is necessary for the great end of society — the best good of the whole." Many in later times have tortured such an expression into that smoother phrase — alliterative but deceitful — "the greatest good of the greatest number." This is a fallacy. Government does not exist for the special welfare of a number only of its inhabitants — not even for that of a majority or any other predominant part — not, most assuredly, as some citizens would have it, for the peculiar benefit of themselves or of their particular set or political party, — but its great end is "the best good of the whole." And such is the real meaning of that grand old English word "commonwealth."

The government which men thus enter into, knowingly and voluntarily, with no fraud, violence or surprise, but by way of solemn explicit and deliberate compact with each other, they form, not for themselves alone nor temporarily, but — subject to such later changes as may on occasion, be fitly made — for themselves, their families and their posterity. Their compact — somewhat like that of a man and woman uniting in marriage — admits them to a status whose sacred essentials are meant to include the prospective rights and interests of others yet

unborn. Permanency is intended. The design is not the good of the framers alone but the good of posterity of a whole community for generations to come. Hence, as Locke concludes, the power that every individual gave the society when he entered into it can never revert to that individual again as long as the society lasts, but will remain in the community.¹

"The world is too much governed" was a favorite postulate of Jefferson and our democracy when the nineteenth century opened. But some of the prophets and preachers of 1776, in their hatred of monarchy and old-world oppressors, had been inclined to belittle the functions of government more perhaps than in our own times would seem fair. Thomas Paine, English by birth, who was hardly an American at all save while he tarried among us, but rather a man without a country, and in his prime the alien instigator of revolutions, American and European, drew in his famous pamphlet a distinction somewhat fanciful between society and government. "Society," he contends, "is produced by our wants and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. . . . The first is a patron, the last a punisher. . . . Society in every state is a blessing, but government even in its best state is a necessary evil." With more caustic denunciation I have heard an orator of my own day, a master of invective, proclaim that "government is a nui-

¹ Locke, § 243.

sance." But when, we may ask, could human society, in any age or clime, maintain intercourse happily without laws and a controlling power of some kind? Two men come together as neighbors, each of whom wishes to appropriate the same piece of land, the same cattle; both desire passionately the same woman in companionship. If two individuals cannot long associate without clashing in their natural wants and wishes, still less can they who mingle in such numbers as to form a real society of mankind, with an increasing population. Society, then, does not stop at the point of blessing us, of promoting our happiness as a patron; nor is government the mere restrainer of vice, a punisher. The anarchist who hurls his bomb or fires his dastardly shot at one unarmed, unguarded and unconscious of danger, promises to society not order but disorder,—and as the robber of other men's rights he would assert a despotism of his own, fierce and mischievous. This is not brotherhood. Only the rule that merges in universal obedience to law and a willing compliance with right and justice towards all, so as to need no compulsory enforcement, can leave society on that safe plane of lasting peace and blessedness which it never yet approached in the world's annals. And meanwhile, civilized government as a punisher, as the repressor of criminals and a terror to evil doers, exercises but one of its prime functions, and while it scourges as of necessity a small percentage of the inhabitants, it secures the lives, liberty and property of all the rest. Besides this, government is arbiter and assuager among the constant civil controversies that arise among its inhabitants, in their domestic relations, in their business, in all

those innumerable interests into which their lives are woven, involving, it may be, the most delicate and intricate combination of rights and the happiness or misery of millions of the human race. Nor should the combined interests of a body politic as against foes or aggressions foreign and external be overlooked. In short, government is at home a protector and more or less directly an essential promoter of individual tranquillity and happiness, while as against the rest of mankind it offers the sure, the only sure, earthly defence.

Indeed, our great fundamentals of temporal polity are comprised in the golden rule, and inspired by the Christian religion. Each commonwealth has in turn recognized in its origin the fatherhood of God and the brotherhood of man. A recent writer,¹ American-born but long a dweller abroad, lamented in old age his lapse into religious unbelief, and the loss of his peace of mind, ever since Darwinism and the announcements of modern science made him a skeptic. Against that inspiring phrase of 1776 that "all men are *created* equal," he compares the duller one of later vogue that "all men are *born* equal." Yet that change of phrase was set forth during our Revolution and did not originate in atheism. We find it in that Massachusetts declaration which changed the diction of 1776, while retaining the sense. "All men are born free and equal" is here the expression. But following this statement, with its instance of rights "natural, essential and unalienable," comes the reverent assertion that

¹ Moncure P. Conway (*Reminiscences*).

"it is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe." So, too, at the outset, this document gives grateful thanks for God's goodness and implores His direction in the present design.¹

It was in France, some ten years later, that a tremendous tide of popular passion, mingled with cynicism, swept away for awhile the old barriers of belief, enthroned the goddess Reason, and set forth the so-called rights of man, as though of earthly origin. "Men are born and always continue free and equal in respect of their rights" proclaimed the French National Assembly; "the nation is essentially the source of sovereignty." But the pillars of a republic dedicated to man's self-sufficiency sank soon into the quicksands on which they were founded and the superstructure lapsed. France is saner and more reverent with her present experiment. Rousseau's marble effigy before the Pantheon still commemorates in Paris the social contract idea to which his writings gave expression; but Rousseau was born eight years after the death of John Locke and hence was but a disciple in this new philosophy of government. Whatever has remained soundest and strongest in the republican establishment of France drew its inspiration from American independence, whose cause Lafayette had befriended and a French monarch besides.

Much of the doctrine we derive from the Bible

¹ The old constitution of Pennsylvania in like manner announced that "all men are born equally free and independent;" while that of Virginia stated that men are "by nature" free and independent. Both of these constitutions invoked God's guidance in framing the ordinance and used other reverent expressions.

comes less from its literal text than from a customary interpretation put upon that text which may admit of change. The Mosaic account of this world's creation is not irreconcilable with the Darwinian theory. It does not assert, as so many of us have assumed, that this whole human species was derived from a single pair who fell from innocence; for in the first chapter of Genesis is the express statement that God created man in His own image; "male and female created He them," and sent them forth to be fruitful and multiply, to replenish the earth and subdue it. And the first-born of Adam and Eve, when cursed as his brother's murderer, is seen wandering from home, to dwell a fugitive among earth's inhabitants elsewhere. In fact, the main purport of the Old Testament is to set forth the origin, lineage and development of the Jews, as God's chosen people; and history, allegory, poetry and prophecy combine to impress their progression upon the rest of mankind. We see this peculiar people brought in contact from time to time with the more populous pagan empires of ancient times, only to preserve distinctively their own traits and institutions, their own ideals of religion, and their own exclusive record.

We may well expect, then, while modern research continues, and historical remnants, geological fossils or the spoils in archaeology of long-buried cities are brought to light, that the origin of man's activities and institutions of government, will be eventually established as of epochs anterior to all authentic record. No annals of history, sacred or profane, that were ever yet discovered show this world really uninhabited save by the people to

whose record those annals were devoted. Each nation — the Jews included — conquered its external foes or felt a conqueror's oppression. And hence if it be said — as against all theory of a primitive government instituted by the compact of men enjoying their natural rights — that no such primitive compact is shown in ancient history, we may reply with Locke that "government is everywhere antecedent to records, and letters seldom come in amongst a people at all till a long continuation of civil society has by other more necessary arts provided their safety, ease and plenty."

But setting aside all theory of a primitive establishment in this respect, we may rest the argument for government by consent upon what should seem most just and reasonable in practice. And here let us concede the vast difference between ancient and modern records in supplying clear precedents, — between the historic institutions of Europe, Asia or Africa and those which North America first put to grand experiment on the western continent near the close of the eighteenth century. Had the colonies planted in this new world after its discovery, under the auspices of Spanish, French or English monarchs, remained in their first condition, government of the people, by the people and for the people might have been unknown to this day, and the philosophy of a government by actual consent of the governed might have remained for mere abstract discussion, nowhere successfully applied in any broad sense. But American independence with us bore fruit on new soil in a modern experiment of that

philosophy, which bids fair, at this grand stage of our example, to change, in times not remote, the whole structure of the world's political society. Thrones, sceptres, absolutism of every kind, the world over, must eventually yield to a growing opinion in the enlightened heart of each united population, which will need only competent leadership and a widely diffused intelligence to make its potency felt as for the general good. In the procedure of our several States, in the procedure of our United States, we ourselves present at length before the world the spectacle of government by actual compact, — by the historical agreement of the body politic with each and all of those uniting under it.

But a government by common consent is not of necessity a republic or democracy; nor do institutions which admirably suit the manners and traditions of one capable community find equal acceptance or adaptation elsewhere. This is a distinction which we Americans, while boasting our own liberal system, do not always keep well in mind. We purpose applying our democratic principle, the ripe fermentation of customs, habits of life and temperament reaching far back into a British ancestry, to men of other races and temperaments, other religions, other surroundings and antecedents; and if they seem deficient in training by such a comparison we pronounce them unfit for self-government at all. We might as well ask whether we could, if so bidden, clothe ourselves with their customary institutions and live happily.

Burke has wisely said: "Politics ought to be adapted not to human reasonings, but to human nature; of which the reasoning is but a part and by no means the greater part." And, again, he reminds us that government is a practical thing, made for the security and happiness of a particular part of mankind, and not to please theorists. Our Declaration asserts no more in this respect, than that each government should derive its just powers from the consent of the governed; and this surely imports that an external sovereignty should not impose its own unsympathetic modes and methods, however worthy of pattern from its own point of view, regardless of the habits and preferences of a people quite distinct. Who are qualified to define the boundary line at which those they rule of another race may be safely permitted as trained disciples to take care of themselves? At what year of the eighteenth century would the British Parliament and George III have pronounced even British colonists qualified to erect their own independent institutions? The only way to save the soul of a community of mankind is to leave that community free to work out its own salvation. Whatever a people wish earnestly for themselves must prove, in the long run, the best for them.

"Laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness" — such is the true rule for forming or reforming under popular consent which our Declaration announces. Upon a pronounced conviction of this kind we have seen, within a few years, the intelligent inhabitants of Norway, at a plebiscitum,

deliberately choose monarchy rather than a republic for their form of government. In ancient times, the Jews, desiring a rule more spectacular than before, under a warrior king, found their wish gratified. France acted and reacted, until, upon her own lesson of experience, a third effort made permanent a republic; its president chosen not by the people but by the legislature. Mexico, though nominally under a government like ours, shows constitutional differences, and her present stability is largely due to a wise and patriotic ruler, a soldier by profession, whose tenure of office, by repeated elections, has become practically for life.

Rome, with her earlier Brutus, detested the name of king; but a later Brutus could not, in the degenerate age of wealth and luxury, rally Romans to withstand the imperial Cæsars. When our own Union was launched, full-freighted, as exemplar of popular liberty to the modern world, the name of king was odious here. Yet a respectable minority of our intelligent citizens, unemancipated from European ideas and traditions, believed in the British system of king, lords, and commons, as theoretically perfect. Monarchy has not in the old world, as society shapes itself, the odium which America bestowed upon it. Great Britain, second to no other power on earth in intelligence, energy and virtue, still yields consent to hereditary rule, with a ministry to conduct affairs responsive to the majority of the House of Commons, while that House and its members are closely answerable to the voters. Call it monarchy or republic, as we will, popular rule in Europe is largely the rule of constituencies in a legislature which represents the

people; and the liberalizing of politics as obedient to public opinion is, after all, the chief concern of government in modern times. Everywhere the trend of popular consent respects tradition, and true patriotism must work out its ends in patience.

Let us observe that, incident to the right of instituting a body politic, the people may rightfully reform, alter or totally change their government whenever their safety, prosperity and happiness require it. And the inducement to such a change should be that the government which already exists fails of its object in accomplishing those ends. Change of institutions sets in naturally, like the change of customs and manners from age to age, and some basic method for effecting it, gently and gradually, should exist under any system; but when it comes to the need of some radical alteration which cannot be so made, and the revolutionary sentiment is ripe for a government quite new and different from that already in operation, the people, rising in their might as some swelling flood bursts the obstruction of a dam, may rightfully substitute what seems to them needful, bringing the new rush of water to a more appropriate level. Government we have always with us, in human life; and such revolutionary changes as find justification do not consist in simply subverting or destroying, but rather in displacing one system and substituting another.

Reluctance to exercise this inherent right of fundamental change should be shown by every people who propose a new and untried political experiment, especially when that experiment has

not already been approved by successful trial elsewhere. For the ills we fly to may prove far greater than those we escape. Such was the equable state of mind with which our admirable leaders in 1776 appealed to mankind. "Prudence, indeed, will dictate," they lay it down, "that government long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."

On all occasions of violent change and dissolution and the establishment of a new autonomy, a new government, revolutionists should show to the world a just cause in order to gain that international sympathy which men need at such a crisis. They should show long suffering and forbearance under tyrannous wrongs; they should show they have reached a last resort; they should disclose rational institutions to supplant existing ones, and a rational and consistent purpose in planting them; they should show sincerity of heart. Their appeal should be to the Divine arbiter of battles who rules the universe; and they should invite, moreover, the alliance or, at least, the passive goodwill of fellow-men massed elsewhere in the great family of nations. Always and everywhere, in this world's political progress, a strong and justifiable presumption exists in favor of the government which is already long established and in continuous operation.

Great changes may be wrought in a government through one of two means: compulsion by some

sterner will to which a people submit as irresistible; or a strong co-ordination of wills among the people to accomplish voluntarily what most desire. But in either case, the old continuity of the body politic should be to a large degree respected, and the habits and customs of those governed allowed a reasonable scope. When our thirteen colonies rebelled, each had its civil and political usages, its own system of self-government, its idiosyncrasies, and hence the republican system which each framed apart worked readily. As the old veteran of Lexington recalled, in a later century, his people went into the fight because they had always governed themselves and always meant to. But as to our continental union the experiment was new, and it was for want of custom and continuity in that respect that political errors were made and the plan needed revision.

Gardiner, in his scholarly history of the English Civil War, points out that the reason why Parliament failed to bring about a government of the people, following the death of Charles I, was that positive compulsion was wanting on the one hand, and regard for the continuity of English habits on the other. And so was it, we may add, with the French national struggle in the next century to set up for the first time a republic. Continuity, in either case, and orderly conduct favored largely an old religious establishment which neither bald Calvinism nor an atheistic fellowship could replace; a legitimate ruler of the hereditary kind; social ranks and orders of the accustomed sort; and withal, the easy pleasures of a common people susceptible to national glory and given to the worship of their betters. The earnestness of ideals appealed to such

an England or France less strongly in those days than the desire to thrive in one's accustomed vocation, enjoy home and fireside as formerly, have a just ruler and escape burdensome taxation. Chronic unrest and discontent, on the other hand, so far as Great Britain was concerned, sectarian earnestness in religion, antipathy to temporal ranks and orders, found presently its way across the Atlantic to colonize this new world; while loyal conservatism and content in the hope of better times remained at home. Cromwell ruled while he lived in the name of Puritanism, Napoleon for a time as the armed warrior of democracy; each shunned the old name of king and assumed of choice another title. Yet the continuity of popular sentiment was ruptured in either case, and when the sceptre fell from the grasp of individual usurpation, reaction brought back for a time in each country social conditions and manners much as before.

In all revolts of citizens or subjects of a body politic, the legitimacy of the existing government and of that orderly establishment by express or implied consent which has ripened *de facto* into *de jure* authority, ought to be well heeded. It is this long regulation of affairs, duly acquiesced in, which produces a social and political cohesion not to be readily disturbed. Not even a popular uprising can justify itself unless the rule antagonized is that of some flagrant wrong or usurpation never sanctioned by the people and intolerably oppressive. For modification merely, for reform, for a better security of fundamental rights, amendment should be sought

if possible through some recognized means consistent with a peaceful continuance of the lawful and established authority. In Great Britain, as elsewhere, during the past two hundred years, liberal extension of the suffrage, with a corresponding control of affairs by representatives of the whole people, has made immense progress; and yet without diverting the tranquil succession of hereditary monarchs or parliaments. We may hold it not as a detriment but for immeasurable gain that the Mikado of Japan, throwing off the dreaded seclusion which once enwrapped the absolutism of his power, has led his own people into the civilized relations of modern life. And inasmuch as Russia owes her singular advance among the world's powers to the wise though barbaric direction of Peter the czar, and his successors, it is but just that her capable inhabitants should seek political salvation, if possible, through methods which may reconcile, rather than eliminate, the political power which autocracy generously, and it would seem honorably, proposes to share with them.

For the United States, severally or in their collective might, an orderly change, whether by specific amendment or the adoption of some new constitution, is both expected, as time goes on, and fundamentally provided for. Whenever our people seek to improve upon existing institutions, State or national, as they frequently must, they agitate and bring influence to bear, to secure a change by legitimate methods. In one instance of our history, and only one, was a more radical course attempted

Door
Rebellion

and the immediate effort failed. I speak of the Dorr rebellion (1841 - 42), where popular repression by a State provoked resistance. Rhode Island, the last and most reluctant of our Revolutionary republics to enter the new Union, was the latest among them all to preserve a royal charter as her fundamental law; and the most obnoxious of that charter's ancient provisions operated for more than forty years of our nineteenth century to confine the right of suffrage and representation to freeholders of land and their eldest sons. The wrong to be remedied was palpable. Cities like Providence grew populous with useful and intelligent citizens, not permitted to vote because — though rich in personal property — they owned no land, and all petitions on behalf of a vast majority were unavailing. Farmers set at defiance a vast manufacturing interest. The charter pointed out no regular means of amendment. Claiming, therefore, that authority in each American State vested inherently in the people, a revolutionary committee of Rhode Islanders called a convention, framed a new constitution which yielded the franchise in favor of the people, and upon its adoption by a popular vote of the disqualified, endeavored to set up a new State government to displace the existing one. The regular legislature and authorities thus defied appealed for protection to the United States under the guaranty clause of our Federal constitution, and the President, as in duty bound, announced recognition of the old and established authorities of the State. Fortunately, at such a juncture, bloodshed was averted and local opinion soon wrought peacefully a reform, by permissive methods. Under authority of Rhode Is-

land's lawful legislature a new State convention was called — this time with regular credentials — and a new constitution giving the desired extension of the suffrage was adopted by the people and went formally into effect. "We declare" is the announcement of this instrument of 1842, abrogating that charter from the Stuarts which had served for nearly two hundred years, "that the basis of our political system is the right of the people to make and alter their constitutions of government, but that what exists at any time is obligatory on all till changed by an explicit act of the whole people."

In other words, the legitimacy of an existing government of competent authority must be respected. It had been a slender thread of legitimacy which held this Union together in 1787 under the old Articles of Confederation when the Continental Congress became paralyzed; and yet the Philadelphia convention respected that Congress by procuring its sanction to submit the new plan of Union to separate State conventions and its consent to abide by the results. That constructive ingenuity which Americans manifest politically on dread occasions like these has won men's admiration in the old world. Whatever the danger, our citizens do not lose their heads nor suffer their government to lapse into anarchy.

We may conclude that government, as we find it to-day among civilized nations, is by no means an exact thing for classification. The old divisions of monarchy and republic do not suit, now that representative bodies of the people are found,

under either form, participating more or less in the public direction. Between free democracy and what we call an oligarchy or aristocracy, republics themselves have varied, as a comparison of our own States a century ago would show — Ohio and South Carolina for instance. With forms of government thus approximating, wisdom and honesty of administration count more and more for the happiness of a people. Yet wherever the mass of inhabitants as voters hold the reins of power they cannot escape responsibility for the men and the means they choose to apply in administering. A despot may ruin those who cannot resist his oppression, because subjects only; but if democracy fails it will be because the people themselves have become contemptible.

CHAPTER VI

WRITTEN CONSTITUTIONS

IF our present form of government remains unchanged for centuries, the stream of American history will flow onward by regular division marks, like a river defined on its map by the tracery of latitude and longitude lines. Wherever great political policies are seen to take their course, the crisis will date during some one's presidency, just as in Roman chronology the reckoning ran when such and such citizens were consuls. But there is this fundamental difference between the ancient republic and our own — that the two who were each year chosen consuls together had by no means the vast power of initiating and directing, which belongs now-a-days to a President of the United States; it is in the governor of a State, rather, with his colorless functions, that we perceive an analogy.

All this humdrum of precision, with regular legislatures and brief and uniform terms of the executive, originates in a closely defined system of government, where both life tenure and hereditary power are ignored, and popular elections, held at fixed intervals, promote fellow-men to honors for short and stated terms. No casual majority vote in Parliament or its popular branch controls, in our practice, the executive, or compels a special appeal to the country; but each department works

independently of the other, to a great extent, while the stated term lasts, and popular pressure, pending elections held at periodical intervals, is exercised but indirectly. Fixed and frequent opportunity for change, not spontaneous change itself, is the boon which a government like our own bestows upon its voters.

America's prime contribution to political science consists in a written scheme such as defines precisely the *modus operandi* for government in each and all of its three great departments. Custom habituates the people to such a scheme, and, except in minor details, no change is likely to occur for centuries to come, if we but keep government itself secure against usurpation. To take, for instance, our constitution of the United States, — by far the most comprehensive and significant of all such instruments, — we see Congress and the Executive measured side by side and balanced, each with its term defined, — Senate and House being renewed apart, — while the Judiciary alone is established with a life or good behavior tenure for each incumbent. All is spaced off clearly and permanently, the machinery of national operation once set in motion. And yet fortuitous circumstance determined the initial date from which all future ones were to be reckoned. March 4th, 1789, marks that initial date in our chronology. Yet it was nearly the end of that month of March before a quorum of our first Congress came together; and, what with delays attendant upon an electoral count and the arrangement of preliminaries, April had fairly ended, besides,

before Washington reached New York city, our temporary capital, and took his inauguration oath, an impressive ceremony. Not until after the 12th amendment to our constitution had been adopted, by 1804, did the 4th of March, as the date on which all Presidential terms were to commence, become embodied in the written text of our fundamental law, so that nothing short of a new constitutional amendment could change it.

From the 4th of March, then, dates constitutionally each new administration and each new Congress for the United States of America, the life of the one embracing the space of four years and that of the other bisecting it. Such has been the constant course for more than a century, and so must it continue, while our present text remains unaltered. Of late years, however, we find some one in Congress proposing an amendment so as to postpone inauguration day to some later date than the 4th of March — perhaps to that very 30th of April, when Washington was first installed. And what is the reason given for such a change? Simply that there is chance of finer weather for out-of-door ceremonies at our capital, than the fickle 4th of March can furnish. A trivial reason this, as against the grave objections to lengthening that interval, already great, between the popular choice in early November and the date, four months later, when a new Congress and a new President may lawfully assume the reins of power.

If Congress really wishes to change the date of Presidential inaugurations for social and ceremonial convenience, no constitutional amendment seems requisite at all. An act of Congress should suffice.

Take a leaf from the late experience of England in the coronation of Edward. He became virtual king on the death of his mother, but the enthronement at Westminster Abbey was postponed for cause to a much later day. A new President of the United States, I presume, can quietly take his oath of office on the 4th of March, and appoint his cabinet, while, if Congress so directs by law, the pomp and circumstance of a public inauguration can beset later.

For students of American history, it may be worth observing that, with November as now the uniform month for Federal elections (as well as for those of most States), the grand electoral year of the Union is leap year by the calendar. Hence the recurring year of the popular vote for President is always some multiple of four; while that for choosing representatives to Congress comes twice as often, or at each multiple of two. The 4th of March following such computation brings the accession of a President or at least of a new Congress.

Invention, in the founding of a political system, comes less frequently as a novelty than through the accretions of long custom. Written constitutions, as we know them in America, should not be deemed a pure innovation — the product of creative genius — but rather the fruition of methods to which these English-speaking colonists had long been habituated by their royal charters. For under the law of the mother country, in colonial times, corporate charters were specially granted to individuals or companies by the king or parliament; and in all British corporations, public or private, lay or ecclesiastical,

such grant was upon certain fundamental terms) and conditions expressed in writing. To such an instrument of legal creation all by-laws or ordinances of the grantee had to conform. If, in Great Britain, municipal government bound electors or incorporators to make rules and to conduct public business after the methods imposed by charter, no less had the great colonizers for British America, whether individual or joint patentees, to found and maintain their respective settlements upon the written terms, more or less liberal, which home sovereignty imposed. Hence came chartered government in America. At the present day we all are familiar with schemes of constitution and by-laws under which private clubs or business bodies organize, and the habit of conforming discretionary development to the more rigid text of fundamental conditions is inveterate. We have grown insensibly into constitutional interpreters in all matters of public regulation, and constitutional interpreters, none the less, in our private relations of life. We move forward like an army corps whose commander must keep to the route prescribed by the written orders of his superior; we manage affairs like the trustee or executor who, with all his latitude of discretion, must observe the terms of the will under which he acts.

Blackstone, whose Commentaries came out shortly before our Revolution, classified the governments of these American colonies as (1) provincial, (2) proprietary and (3) charter. And yet, historically speaking, most of our thirteen colonies had been settled originally under a parchment charter or grant of some sort from the British crown, which

served as a basis of government; most inhabitants, moreover, had accustomed themselves to some written fundamental policy to which all local legislation had to conform. A royal governor ruled his province under instructions which accompanied or followed his commission from the crown; while proprietors, as in the Penn and Baltimore families, framed their own basic conditions for the people. Massachusetts had a charter, reserved and cautious in its allowance of self-government and unlike the earlier one; while those of Connecticut and Rhode Island were so liberal in that respect as to serve for written constitutions long after each became an independent State.

The germ of popular rule in our colonial charters consisted, like that of all private guilds or corporations at the common law, in bringing the whole body of stockholders, or those immediately invested with affairs, into an annual meeting for the election of managing directors. Representation serves the convenience of modern civil government, popularly conducted, as does the proxy in private corporations.

Provincial governors came into harsh collision with our local assemblies of the people in the last colonial years; and against their harassing conduct those of our colonists rebelliously disposed set up the claim of earlier rights and privileges under the charter now transgressed. But fundamental restrictions of some kind were generally admitted; as, for instance, that no law in these colonies should be made repugnant to those of England; and, in all but three of our colonies, it was clear that the British crown (aside from a royal governor's negative)

reserved its right to approve or disapprove each colonial act of legislation. There were other fundamental terms, deemed by our settlers in the nature of a privilege rather than a grievance; such as the right of making judicial appeal to England from all colonial courts; or that charter provision, expressed or necessarily implied, that the laws of England should be locally enforced so far as applicable.

These early American charters afford a curious and interesting study. In the earliest among them we find ideas expressed which have immensely influenced the growth of manners and politics in this new world, not through the colonial era alone, but for all history. Some power external to each colonial legislature must have existed for testing the validity of its enactments; and that paramount power the mother country claimed as her own. Emanating from the same national source, and embodying the same national purpose, we may expect to find these thirteen colonial governments closely, on the whole, resembling one another in essentials; at the same time that differences of local origin and development gave rise to local idiosyncrasies in the details of public management.

It may be said, moreover, that written instruments befit our modern theory that government rests primarily and most fitly upon the consent of the people, and is derived from their voluntary compact. Such, we have seen, was the ideal set forth by John Locke and his inspirers. American annals record with a tender pathos the gathering of pilgrim fathers in the *Mayflower's* cabin to sign



such a novel compact for that strange land on which they were about to set foot. Nearly thirty years after this earliest precedent set by her own children, we see England herself, in 1649, while all was civil turbulence and the King's fate in suspense, considering in the House of Commons that scheme of a written constitution known as the "Agreement of the People." That the scheme itself proved futile does not militate the doctrine that government draws properly, in its establishment, the fundamental consent and confidence of those destined to live under it. England failed; and so far as America's better skill in such framework is concerned, I conceive that long tuition under chartered forms explains best our own successful evolution of written constitutional rule similarly agreed to.

Sir Henry Vane, that spotless champion and martyr of popular rights through England's civil war, who brought to the service of a commonwealth the self-effacing support of noble birth and philanthropy, has been praised by some as the real originator of the idea of government by written constitution — as projector, in fact, of such a system in England long before English colonists in America ever applied the idea. But I think, rather, that the seed of that same idea germinated in Vane's mind in earlier manhood, when he walked the narrow streets of Boston a fellow-colonist and, honored as a privy councillor's son, was chosen governor of Massachusetts for a year. The suffrage which gave him that promotion deduced its sanction from the King's written charter, however forced might have been the interpretation of that parchment. And more than this, American scholars have shown

that soon after, or in 1638, Connecticut adopted a written constitution of her own in a general assembly which met at Hartford. }

The two chief components of American State constitutions have been: (1) a bill or declaration of rights and (2) the framework of government itself. And hence, in one aspect, such an instrument is seen to be a written safeguard to each individual citizen against all undue pressure of the people as a whole; and, in another, the charter of common security for citizens at large — for the body politic combined. For the bulwark of all government by compact intends a two-fold purpose — the welfare of the people as a whole, and the welfare of the people individually. ✓

But declarations of right and details of disposition are not always easily separable in such instruments. States, from 1776, set up apart their separate schemes of organized rule, consonant to colonial experience, under instruments which blended declarations of right with details of administration. Here a preamble of rights, followed by a separate framework of government, became so much the style of composition, that when, in 1787, for the whole Union, a new constitution was framed to replace the futile Articles of Confederation, objection was made that this instrument offered a framework only; and yet among its original provisions were various safeguards of rights, — such, for instance, as concerned *habeas corpus*, bills of attainder, the punishment of treason, and the prohibition of religious tests for office. In State constitutions, too, we find

scattered provisions which bear upon individual immunity, among the details of government erection.

The great advantage of a written scheme of government for a commonwealth consists in precision and permanency; its disadvantage is rigidity, a want of elasticity and adaptiveness to changing modes and circumstances in society. It is fundamentally ordained that public operations shall go on after a certain course; and any one, where abuse or violation is threatened, may appeal through the courts to the written text, wherever that text is explicit. Yet it may come about, in the lapse of time, that the course so ordained gets antiquated, outworn, unsuited to the new genius of the body politic; and in such a case the explicit text cramps like a steel fetter. We must change or modify, or else we must circumvent provisions. Thus, our Federal constitution, so hard to amend literally, became irksome to the people, as democracy grew, in committing the choice of President and Vice-President to sporadic colleges of electors; and the remedy was found presently in choosing such electors as mere agents to register the people's vote. Quite contrary was this to the original intent of that instrument. More recently, voters have chafed at the literal requirement that Senators in Congress be chosen by a State legislature; and again an expedient gains ground — that of pledging legislative candidates to respect the voters' own preference for Senator as shown at the polls. For here amendment is doubly difficult, since Senators in

Congress oppose the change. In short, the people advance in political influence and the control of affairs; all public agents or managers, all electors, representatives, officers, must yield to the collective sovereignty that employs them. The written text, then, of a constitution remains, but the spirit which applies it practically is liable to change.

And again, we should observe that while the written text is explicit on many points, its language may admit of inference and construction. And this is well; for a written scheme of government should not be precise in the lesser particulars. We are not likely to see a president of foreign birth placed in authority over us, nor a chief justice deprived of his office against his will without some formal process of impeachment. We shall not find a House of Representatives assuming to legislate regardless of the Senate, nor a Senate originating revenue bills in utter defiance of the House. For on such points the mandate of our Federal constitution is clear and positive enough. But when it comes to considering how far an Executive may rightfully initiate a foreign policy of his own or pursue military reconstruction in disregard of Congress; or in what respect the United States may levy taxes or appropriate money without trenching upon the reserved rights of States or the people, we are left to a debatable interpretation of the instrument, because its intent is left in doubt and certain powers are merely implied.

In any instrument of compact which men of one generation may frame together, their only clear comprehension relates to existing circumstances, a present atmosphere; while with other generations

in the remote future vast changes of condition and surroundings may arise, unforeseen by the original parties to the compact, incapable in fact of being comprehended in their full bearings, even though men among such framers may have had the prophetic wisdom of a Moses. Especially does this hold true in a progressive government like ours, where foundations are laid for a new nation of immensely expanding area and population, whose citizens are stimulated each and all to education and advancement. Who among the fathers of 1787 could have imagined that the union of States and territories for which they contrived would transcend ere this the Mississippi, stretch beyond the defiant peaks of the Rocky mountains and wash the distant shores of the Pacific? So is it, again, where new inventions of science change vastly the social and industrial operations of society. And thus already do we reach a bound-post of time, by no means the remotest, where an old textual scheme of government, with original language unchanged, must of necessity be construed and applied to wholly new conditions — to a modern situation unforeseen and never by the clear foresight of our ancestors provided for.

It is here that the inconvenience of a written constitutional text not readily changed becomes painfully apparent to posterity. A law, like our common law, by slowly broadening precedents, with easy opportunity to advance or modify gradually, as customs change, and even to overrule or reverse — a law which marks by stakes, as it were, the progress of common sense under those varying conditions of life which impel the current — may direct naturally, and its regulation runs smoothly,

even though at times apparently capricious and uncertain. And in purely statute law, opportunity is found, as new legislatures convene, for change and conformity to prevailing modes. That body which we see assembling so regularly to enact laws, fixes and unfixes, as opinion bids, and does away with the obsolete. We may tire of such constant mending and meddling, yet we should be far worse off if acts of legislation were not readily liable to change. But now when we come to the fundamental principles proclaimed in a written constitution for selves and posterity, we find, as most appropriate, a certain stability and fixedness to which we must, in large measure, conform our political habits. And that impresses upon us, first, that those fundamentals should be few comparatively, broadly applicable and fair to remain long unvaried; next, that some adequate measure of change, however conservative, should be provided; and lastly, that the slower and more difficult the efficient means of change, the more liberal should be a permissive interpretation of the text itself as present convenience may require.

As to change itself, this, under our Federal constitution, unlike that of most States, is involved and difficult, as perhaps it ought to be where interests so vast and intricate in their scope involve the happiness of millions of people spread over so immense a surface. More of the difficulty, in fact, is due to our steady national expansion since the constitution went into operation, than to any specific hindrances imposed by the instrument itself. Ten articles of

amendment were readily adopted which our first Congress proposed in 1789, and two more were added without much agitation in the course of the next fifteen years. But thenceforward the process became blocked by the increasing magnitude of the undertaking. The only three articles since added to our Federal text in the lapse of a century have been the military outcome of a bloody and devastating strife. Under one permitted method of amendment, Congress, by a two-thirds vote of both houses, proposes the change and the legislatures or conventions of three-fourths of the several States must ratify. This is the only method thus far pursued. Another and a more ominous mode is provided, whereby, on application of the legislatures of two-thirds of the States — now forty-six where once they numbered thirteen — a national convention shall be summoned. Yet, even in such a dread alternative, Congress cannot be dispensed with; its own majority of Senate and House must call the Union's convention in order to give it legitimacy, and though the intent of our constitution is mandatory in that respect, the question still remains how can two-thirds of the States compel their application to be respected? For to hold a convention of their own, Congress failing to pass an enabling act, would be revolutionary. But here we may trust to native ingenuity should an exigency occur; and the inference is that at such a stage of public expression reformers would find a majority in both houses, to carry the needful measure.

Fundamental provisions irrevocable and perpetual in terms are sometimes found, though rarely, in a written charter of government; yet the binding

force of such provisions upon a remote and unwilling posterity must be doubtful, and certainly such provisions are impolitic. Only two exceptions of the kind are seen in our Federal instrument: one, which left the slave trade unhampered until 1808, proved but temporary; the other, of truly permanent import, forbids that any State, without its consent, be deprived of its equal suffrage in the Senate. We hold it a hardship, that in a body of increasing potency so immense as the United States Senate, Nevada, a mere mining camp, should cast peremptorily a vote equal with that of populous New York or Pennsylvania; yet thus it is written, because of original compromise; and dwindling numbers or lessening resources can never be made here the basis of discrimination against an unwilling State once duly admitted, if perpetual provisions hold good. The only prudent recourse of Congress is not to admit as a State at all, where decay or insignificance appears the probable outcome.

Wherever change in the written charter of government becomes practically impossible or extremely difficult, the modification attempted will be in a free interpretation of the existing text. Fashions change and so do ideas; social and business modes vary from age to age; the prevalent desire demands that government shall not hamper the public will too closely nor confine it to the trammels of a method which it has outgrown. To republican forms of government America has become attached, and long experience in popular methods deepens the affection and reverence for them. We are willing to be brought up as pupils to such a faith and to practise it when mature. We are loyal to a Union

the grandeur of whose development has been largely due to a development in the several States, whose separate inclination to democracy has proved the guiding influence.

As to the aggregate powers of the United States, this general government of ours, it was well that the written text employed general phrases which admitted of a flexible meaning, rather than enumerate and define specifically. Such should be the constant preference in all written instruments of lasting and momentous import; for where, as in some of our later State constitutions, technical details are copiously set forth for rigid observance, contempt and a wilful disobedience gain root unless textual change is easy; though there it has been easy. But in a national experience, where amendment of the constitution is found extremely difficult, we have had eras and ruling parties of strict construction, and eras and ruling parties of broad construction; and accordingly the interpretation of our written text varies with prevailing politics from age to age. Strict interpretation was the fashion in the days of Jefferson and Jackson, while at the beginning, under Hamilton's inspiration, as again at the present time and during our present administration, the most latitudinous construction of Federal powers has been claimed. Once the text of our written instrument served as a sort of fetish to bind men's consciences, while now we see a stretching forth by those in power to perform some daring act thought desirable, the possibility of constitutional constraint coming only as an afterthought, and when the pride of achievement has already been enlisted to coerce a court of interpretation.

The rule of interpretation is a familiar one that a statute should be construed according to the contemporaneous intent of the legislature, giving due heed to circumstances. But some acts of legislation are meant to be specially applied or temporary, while others are intended to serve for a long period with broad and expansive application; and where the latter was manifestly the intent, an adaptive sense seems reasonable. If we may affirm this distinction in a statute, so readily repealed or amended by comparison, how much more fitly should it be of a written scheme of government, affecting the lives and fortunes of vast numbers of inhabitants, in a long line of crowding ranks through generations to come. And especially should a flexible interpretation hold good where experience is progressive, while literal amendment of the text is difficult. For it is better and healthier to give to an ambiguous ordinance a meaning appropriate to existing needs, than to plunge a people into bloodshed for the sake of consistent precedent. Advance we must, and if we cannot surmount an obstacle in the path we must work round it.

This constitution, which for more than a century has given stability and scope to our national system, was by its own written expression ordained and established by the people of the United States for themselves and their posterity. It set up a lasting framework under which successive Presidents were to serve for four years, and successive Congresses were to consist of Representatives chosen for two years and Senators by a rotating scheme for six, while incumbents of the Judiciary were each to hold office for life. The admission of new States in the future

and even the subdivision of States was foreseen and provided for. On one special point an unalterable condition was imposed for twenty years. Here, then, was an extensive written scheme for the whole people and posterity, far transcending by intentment the reach of most acts of mere legislation such as we find contained in a code.

But appeal to the written text is not the all in all of constitutional government. Appeal lies furthermore to the honor, the loyalty and patriotism which that text engenders. Government after a certain pattern welds together in conformity the people and their constituent parts; general habits are formed, contiguous inter-dependence is created; while, should dissension arise, such a principle works out its natural association on the one side and its disassociation on the other. Such was the insensible operation of our Union, in its social and individual growth, three quarters of a century ago, until civil war resulted; the situation, unforeseen by our framers, being, that two hostile social and industrial systems had expanded in rivalry across the whole continent geographically.

By the time that Calhoun and Webster debated in the Senate the true intent of our Union — which partook really of a two-fold character — and still more so after both of them had passed from life, no mere construction of a written text could suffice for our practical conduct as people in the political sense. Flesh and blood were bound up and bound together. The conditions of 1830 or 1850 in this Union were not those of 1790 or 1800; nor even were those of 1850 identical with those of 1860. Nothing stagnated. In the South, homo-

geneous in staple-raising interests and an aristocratic structure of society, many now felt a strong wish to dissolve relations with the rest of the States and recombine by themselves; while the vast majority of States and inhabitants were devotedly attached to the one Union to which they had constantly owed their prosperous existence and happiness. It was more than an issue of *ita scripta est*; it was that of the most passionate feeling enlisted opposingly. Long since that strife of 1861-65, the two sections, once in belligerent warfare, have reunited; and with a mutual harmonizing of industrial and social systems throughout the Union, our constitution amended and the old barriers swept away, we see other habits of national life adopted and other standpoints taken for a textual construction of the charter we all live under. Custom will continue to influence the passions of our people, and those passions will still influence interpretation, or rather will bend verbal and literal expression to immediate needs. And once more, in all interpretation of man's written ordinance, there is an ordinance from above, divine and all-comprehending, to which wisdom and human effort should ever conform. "No human laws," says Blackstone, "are of any validity if contrary to the laws of nature;" and these laws of nature, — or indeed of nature's God, — are lasting and immutable, the rock foundation alone fit for human fundamentals.

And yet I would not have it thought that the test of interpretation, at any crisis of constitutional government, lies in the inherent wishes, the passion, the mood, the passing spirit of the times. Every administration has its caprices, its errors, its pet

notions, at a particular period. If it be wrong and foolish to invoke our national pride to make strong and permanent what is wrong and unjust in a present policy, it is doubly so to force interpretation of a written text to the sanction of some prevailing evil erroneously uppermost. We hear much in these days of making constitutional law mean just what we wish it to mean; of teaching administration in America as a science which law, all written fundament of government, must yield to and subserve. Such a theory, if followed out, leads to despotism of the strongest, to the subversion of all salutary constraint, of all check rightfully imposed by the past upon the inclination of the present. Such impulsiveness and disrespect of discipline we should avoid. The great danger of our present American age lies in the inordinate pursuit of wealth, in aggrandizement, accumulated force and monopoly. We are hardly willing, as a nation, that other nations should trade except as our own feeders and subsidiaries; as individuals we seek to set up standards of personal privilege inconsistent with those theories of equality and moderation on which the republic was founded. We need, therefore, the constant curb of constitutional constraint—of fundamental maxims strong enough to compel government in the name of the people to respect itself.

What shall be the authoritative arbiter, the true human interpreter of a written constitution? In American law this arbiter of fundamental power has constantly been the supreme court of appeal in the jurisdiction; and long since, such an immediate

umpire has been recognized both in State and United States practice. For the legislature may pass an act, or the executive may initiate a policy, which conflicts or seems to conflict with the constitution, so that rights of the individual or of the general public are put at jeopardy. Judicial intervention resolves such an issue, and this after a method which best conciliates assent. A test case between individuals is made up and tried, when, perhaps, the eagerness which induced the enactment or policy in question has somewhat subsided. The solemn decision, affirming or disaffirming, affects only the immediate parties before the court; it is rendered dispassionately, after full and exhaustive arguments on each side as to the legal aspects of the question. The opinion in full is published and goes permanently upon the record; no sweeping overturn of legislative or executive act is attempted. The result of any test case is to put government to its afterthought and give calm reflection an opportunity. If, in the suit brought, one party litigant may thus escape the act challenged as unconstitutional, others by suit may do the same; and government avoids the dilemma of a practical frustration by accepting such arbitrament, no department bearing more than its own share of the consequences.

But we should observe that the decision of the supreme or appellate court on a constitutional issue does not always gain or deserve finality. For of the three grand departments of government, — executive, legislative and judicial, — the judiciary is the weakest, the least capable of enforcing its own mandates. In times, accordingly, of vehement onset by executive or legislature, especially where

judges themselves are chosen at the polls, the judicial instinct must be to bend to the blast — to apply the ingenious casuistry of a profession to sustaining the course that government may already have entered upon. Nor is a court likely to fare better when it undertakes to resist the popular current by a decision untenable. Judges themselves prove predetermined and fallible, on political issues which strongly involve political feeling; and neither the immunity of lofty station nor a life tenure of office can wholly assure one's personal independence as umpire. No human tribunal, in short, is found wholly pure, wholly true, wholly unbiased in judgment.

From a bench of justices, however august, a government like ours has one last appeal, in great emergencies which enlist the passions and interests of a whole people. It lies in the people themselves, who may rightfully consider upon review the issue involved, and, through constitutional means, — as in condemning at the polls, agitating a change, placing other public agents or representatives in power, upholding by stress of arms, if need be, a contrary course, — may compel at length, as rulers, that obnoxious decision, or rather the obnoxious act or policy therein sustained as constitutional, to be reversed or abandoned. This, in a republic like ours, is *ultima ratio* and the people themselves through legitimate elections should finally prevail. Though the purgation be a drastic one, it may save from death itself and dissolution. No worldly adjudication can be more solemn than this.

CHAPTER VII

A UNION OF STATES

AMERICA, as we have seen, — the English-speaking inhabitants of our thirteen original States, — set to the world the first grand example of government as based upon a written scheme of fundamentals, framed by assembled delegates of the people in convention, duly adopted and practically applied.

True, we derive from England herself, our home and mother country, documents of an earlier date, expressive of what Chancellor Kent has styled "those great fundamental principles which support all government and property."¹ Magna Charta, *habeas corpus*, the bill of rights settling the succession in 1689 upon William and Mary — these and kindred parchments long preceded America's revolt against the mother country. Revolution on this side of the Atlantic was not for subverting the civil rights therein embodied, but to confirm and perpetuate them for another continent. As a fact, many of those precious maxims in our American constitutions originated earlier in one or another of these English instruments.

Yet such parchment declarations, English or American, usually promulgate nothing new, but

¹ Kent Com. 451.

rather reassert time-honored rights of the individual or the people which arbitrary power had once abused. "Not a single new right was given to the people," says Macaulay of the act of 1689; though the germ therein implanted, he adds, yielded the ampler civil and religious liberty of a later age. *Habeas corpus*, we may recall, was a freeman's recourse in the courts, long before the definitive act of Charles II gave it a firm footing. "Due process of law" had been granted by Charles I in 1627, upon Parliament's petition, not as a novel act of sovereign grace, but in recognition of an ancient statute, at least three centuries earlier.

In brief, the great documents of what has been termed the British constitution, are, for the most part, reassertions of fundamental rights of the British freeman, remote, in fact, and far antedating America's settlement; so true is it, historically, that civil liberty, in our Anglo-American race, has been nurtured through generations in long succession on parental soil, — that the fountains of our common law are supplied from sources hidden in remoteness. And yet the British constitution, so-called, reaching back into mediævalism, is very different from our constitutions of modern America; for these not only guard one's sacred rights against his government or the rights of the people collectively, but they establish the whole framework of government itself in its several departments. The Briton remains a subject, bound in allegiance to a sovereignty long ago placed over him; while the American is a citizen only, joined with fellow-citizens in the patriotic support of institutions which they have established together within a century and a half and still legitimately control.

For our ancestors here the feat accomplished, the problem solved, was a duplex and difficult one. Not only under a written instrument did they separately ordain State government, but they set up unitedly a central authority which should combine the orbits of present and future commonwealths in one grand system. Hence have we for supremacy the State and the combined United States; the latter fabric superposed, and both sovereignties working in unison and contemporaneously for the common good. Complex, intricate, and sometimes antagonistic in their joint operation, we have well accustomed ourselves to the ingenious mechanism, and government of the people moves on in majestic poise, delicately adjusted to those centripetal and centrifugal forces, both of which are needful to a rational liberty.

It is not, then, as a nation or an empire, pure and simple, with the cumulative strength of a centralizing power, that we stand guard over this continent, but as a union of States — a Union which, experimenting at first as a league or confederacy, was presently made stronger under a more perfect ordinance of the people; yet, at every stage of development, confined in its sovereign scope under an instrument carefully drawn up and deliberately adopted, — all residuary powers remaining in the several States or the people. We are not and never were "the American nation," as some would style it to-day — though national sentiment gains headway steadily — but the "United States of America," and literally confined in dominion to this hemisphere. Our consistent motto has been "*E pluri bus unum*" — the unity not of many persons but

of many distinct commonwealths. The flag of our Union, surpassingly beautiful, symbolizes fitly our historical origin and historical growth; its thirteen stripes of red and white immortalizing the thirteen founding States, while its blue galaxy of stars at the corner changes gradually, a new star added for each new State. Yet we must confess that those stars seem smaller and less distinctive as their numbers multiply on the azure square; that those unchanging stripes of red and white become more and more significant of a State glory that has passed; while, on the other hand, the flag as a whole, the symbol entire of the stars and stripes, attaches ever closer, in its world-wide circuitings, the affection of a people and the respect of mankind. Though we may never be in literal truth a nation, while this constitutional union lasts, yet our susceptibilities are strongly national and must continue so.

No new government rests fundamentally secure, which is not to a large extent the accretion of institutions already familiar and acceptable to its inhabitants. To design, to set up a political establishment entirely novel, with no support of customary habits, is to work gropingly and invite the errors of inexperience. Something of this sort happened historically in framing the government of our Union. For the thirteen original States, each with its own characteristics of colonization and development, the task was comparatively simple; for here a colony was to be transformed into a commonwealth, with the same jurisdiction, and much the same distribution of powers as before. But for a Union of these combined commonwealths — needful as that Union was felt to be for successful revolution

— plans and clear precedents were wanting; State and local jealousies obstructed; and the first actual experiment of a United States wrought out failure and almost inevitable disaster, before a second and stronger plan replaced it. Not national, nor yet confederate, but a compound government, federational, has been and still continues the result.

Lord Kames, of Scotland, predicted in 1774 that though an American Union would be difficult (as he thought), each colony was already prepared for its own republican status by merely dropping the governor who represented the Crown. In Connecticut and Rhode Island, governors in fact were already chosen annually, as their charters permitted; and so had it been in Massachusetts, in her earlier history. To democracy in other respects the people of these thirteen colonies had long been trained. Town or county had supplied the unit of local rule; and town or county representatives had been yearly chosen, moreover, for each colonial house of commons. A local judiciary had long been maintained with smooth-working machinery; while for a local senate or upper house in a legislature of two houses, the familiar provincial council of the governor might be readily made over. In short, the image of State government in America, with its three-fold distribution of fundamental powers, had long been visible in the structure of these thirteen colonies, as developing apart for a century or more under the parental supervision of Great Britain. And accordingly, when filial ties were severed, the omnipotence of a State legislature composed of local representatives

was the fact most palpable in our new self-establishment. For a local assembly of the people, in colonial times, with the customary permissive right to tax and raise a revenue, had long been the bulwark and resource of our several colonies, whenever concerting against parental oppression.¹

Bills of rights we find in these earliest State constitutions, whose maxims came directly from the English documents I have mentioned or else were evoked from colonial wrongs such as the Declaration itself recited. Written constitutions, *flagrante bello*, transformed thirteen dependent colonies into republics. Virginia and Massachusetts characterized with dignity the new establishment as a "commonwealth;" Pennsylvania ambiguously as a "commonwealth or state;" the other ten as a "state."

For times thus early the "convention," composed, like any legislature, of chosen representatives of the people, was the grand regenerator of government and fundamental law. Sovereignty in any event was set in operation through delegates of the people; but convention was something distinctive, as though summoned from the profoundest depth of human authority. Virginia, in 1776, set the example, soon generally conceded, of calling a representative convention together as a fresh and immediate emanation from the people. Each popular constituency chose its own delegates, and such a convention revolutionized political society at its own plenary discretion, always, however, in order that a government, republican in character, might result.

¹ Schouler's Constitutional Studies, 51.

If there be any new political phenomenon which time reveals in the several State governments of our broadened Union, it is the increasing strength which referendum bears to the primitive plan of representative authority; it is the democratizing of a State's own institutions somewhat as in the old local town or county meetings of all the voters. Whether such change appear in giving greater latitude to the voter himself, than at first, for choosing high dignitaries of the State, executive or judicial — officers who a century or more ago were selected almost invariably by governor or legislature; or by encouraging the procurement of new constitutions or new basic amendments for curbing legislative and official discretion; or, finally, in applying the initiative or referendum to statutes themselves, so that a sort of plebiscite may serve the ultimate test of enactment — in all such instances our State progression at the present day is decidedly towards a closer popular direction in affairs. It is because of the growing complexity of our modern life, social, political and industrial, — the congestion of wealth and opportunity produced by immense corporate concerns, public and private, as population concentrates in its distribution, — that democracy finds its aims counteracted and struggles to assert itself. Corrupt and grasping monopolizers are its deadliest foes, and a reasonable regulation of some kind becomes needful.

The referendum of a new constitution or of a constitutional amendment is a vital incident of broadened self-government as a principle. For next to individual influence in one's own home, his family, his social and political environment of town or city,

his choice of a representative, should be that of voting upon all changes of the basic institutions he lives under. At the present day, our people as a whole do not think the representative convention itself sufficient, even though a legislature should co-operate; but any convention work as a final product must be submitted to the voters for their majority sanction before it can fairly become full and operative. Two modes are thus left optional: one, to propose constitutional amendments through the legislature, such amendments to be duly submitted to the voters for their direct adoption or rejection; the other, to summon through the legislature a State Convention of representatives duly chosen, with full power to draw up a new constitution for superseding the existing one, or at their discretion to propose only specific changes,— their work to be tested likewise by direct submission at the polls. In either case it is virtually a referendum to the whole body of voters that determines whether or no the proposed fundamental change shall take effect.

But some of our States go even farther at this day in upholding a people's sanction as paramount. For the time-honored intervention of the local legislature, whether to propose formally such amendments or to pass a law summoning a convention, blocks sometimes the wishes and purpose of the people. From self-interest or other unworthy motive the legislators of one or both houses may shirk their duty to initiate, so that modification or supersedure of an existing constitution fails consequently at the threshold. Two States, at least, have met that difficulty in recent years. New York,

by its constitution of 1894, provides, by way of option, for the automatic assembling of a State constitutional convention once in twenty years, if the people vote favorably for it; and no initiative at all is needful to that end on the part of executive or legislature. This is something unique in our political annals. The Oregon constitution of 1902 makes an innovation still more sweeping; for aside from convention or legislature altogether it permits specific amendments to be drawn up and proposed by popular initiative. Whenever such proposals are duly filed in writing with the secretary of State, the governor shall make proclamation; whereupon such amendments, with pamphlet arguments *pro* and *con*, shall be submitted to the voters at large, at the next general election, for a conclusive adoption or rejection. All, then, is not strictly representative, now as formerly, in the creed of American politics.

Within the last twenty years, to be sure, we have seen some Southern States resorting once more to a local eighteenth century practice, by allowing a convention of delegates to frame a new constitution for the commonwealth, once and for all, without hazarding its submission for adoption at the polls. The reasons for this, however, are local and peculiar; the constitutional change in view being to limit suffrage in fact so as to exclude a certain class of citizens racially from participating in elections, as before. This was the work of the white men of a commonwealth, convinced that such a change — a negro delimitation — was vital to the general welfare. I make no comment upon the change itself, which seeks artfully to avoid conflict with the

fifteenth federal amendment; time, that tries all things, will test the wisdom of such work. Yet all must admit that a self-sufficient constitutional convention is abnormal in a democracy, at the present age, however discreet its action. For our own race, at least, if not for all races the world over, true liberty tends to enlarge, not diminish the franchise; and education, public or private, when patiently bestowed, develops self-respect and self-restraint in the individual and impels him to live well, both for himself and others. By the time that any one indicates his worth in the community, through intelligence and honest industry, the right to vote will hardly be denied him.

While at the date of the Revolution, our thirteen commonwealths resembled one another in a certain type of self-governing democracy, traces of original differences of settlement were yet visible. As far back as 1635 we see, from Winthrop's Journal, how fondly Massachusetts regarded her filial Connecticut, while Virginia was thought irreligious, and sailors who had come to Boston harbor on a Maryland bark were hauled before the magistrates for reviling the townspeople, "calling them holy brethren, the members, etc., and withal did curse and swear most horribly."¹ Yet, notwithstanding differences in temperament, ideas and habits, all our thirteen colonies were republican at heart; and all stood sturdily for liberty and human rights, when jeopardy drew near. Under the blended influence of a representative Union and representative States, with an immense immigration added, these types have

¹ Winthrop's Journal, 1634-35.

softened their contrasts during the last hundred years; though, for a considerable space in the nineteenth century, population moved westward mostly in parallel lines — New England and the Virginia neighborhood, more especially, impressing themselves upon settlers in that basin of the Mississippi which the Ohio river divides, so as to people a broad area with farmers on the one side and planters on the other. But western habits and intercourse made a breezier, a more boastful, a less conventional set in this great fertile valley; though superior wealth, variety and numbers favor still the Atlantic slope to the present day. And, more than all this, we come to realize that, in addition to the earlier influx of emigrants from Great Britain and northern Europe, we have now a vast swarm yearly from the Mediterranean ports, with French Canadians, besides, who pour into the mill towns of New England. These people are not English in traditions, language or religion, and they multiply faster than do our English-speaking families. Northern Atlantic ports, such as New York and Boston, bring together the medley brood of a composite white race of differing language and religion, to join their destinies with ours: Italians, Greeks, Jews, Hungarians, Russians, Syrians and Armenians among them. All these seek shelter in the faith of equal rights and self-government; nor possibly will our vast experiment, as events now tend, limit itself for all time to a single continent or to a single race of mankind.

We come, now, to consider the evolution of the one united government from the many. How ten-

tatively, how reluctantly, by comparison, this central United States was planned and placed to overarch State sovereignty, the record shows clearly. True, those thirteen commonwealths had always been unified, in a sense, from abroad, and reared together as liege colonies of Great Britain. But they were not the only British colonies on this Atlantic slope; Canada, to the north of us, would not join our struggle for independence, though repeatedly invited. To such British provinces standing armies and taxation from abroad were incidents familiar; but to us they had not been.

Among our thirteen colonies there had been various tendencies to union from the outset. The immense preponderance of Anglo-Saxon elements guaranteed to the soil a people bound by those lasting ligaments of a common origin and history, a common language and literature, common customs, common institutions and a common jurisprudence. Europe, besides, had gained, since the discovery by Columbus, more than a hundred years' headway in liberal ideas before our colonization commenced at all; and our settlers were Christians of the Reformation for the most part, unlike the French and Spanish colonists of earlier date elsewhere. They were liberal experimenters in politics, and their love of liberty, naturally expansive in a new country, drew peculiar sustenance from England's own effort under the Stuarts.

Moreover, these thirteen colonies, in their common isolation from the Old World, inclined where contiguous to enter into mutual leagues and compacts. Arms and succor had to be provided against the Indians, their common foe, where philanthropy

might not pacify; reciprocal trade and commerce, on common rivers, across colonial borders and along the seacoast, needed occasional adjustment, as also did the reciprocal right to settle, buy lands and inherit, and extradite criminals. The royal grants defined colonial boundaries towards the interior with so little precision that, whenever the time should come to push settlements westward into the remote wilderness, conflicting claims must have merged into a common territory, with common pre-emption from the red tribes and a joint and comprehensive policy to pursue towards all frontier foes of our progress. For behind these untamed aborigines, and outflanking us by way of the St. Lawrence and great lakes and the Mississippi, stood France and Spain with their missionaries and explorers of earlier date than our own. Still more instant for mutual adjustment were Atlantic problems of coast and harbor jurisdiction, and disputes among adjacent provinces over the use of such navigable highways as the Connecticut, Delaware and Potomac rivers, and the New York, Delaware and Chesapeake bays.

That tendencies to union existed early in these colonies without consciousness of disloyalty or forecast of a coming separation from the mother country, appears from various leagues or compacts of the colonial era. First and foremost among these was that of the "New England Confederacy," formed in 1643 among settlements congenial and homogeneous in character and origin. This Confederacy lasted about forty years, profiting by the

civil distractions at home under Charles I and Cromwell; it was styled "a firm and perpetual league;" and, besides providing for a combined military defence against invading Indians and the Dutch, it arranged for a mutual reception of settlers and the mutual extradition of "servants" and of fugitives from justice. Here and in other less conspicuous instances of the kind among contiguous colonies, a board of commissioners, mutually chosen on the principle of co-ordinate sovereignty, was found a convenient mode of negotiating differences.

After the New England Confederacy had finally disappeared, various plans were broached, here and at London, for a more comprehensive union of the British colonies in North America; and a loyal unanimity of action was the object, more especially against those French and Indian allies who menaced the general safety. Most remarkable in that respect, and portentous, too, was the assembling of a delegate convention (or congress) at Albany in 1754, at the King's own instance, in view of impending war. Not only did those delegates manage the main business for which they had been summoned, but they adopted and proposed both to Great Britain and the colonies a permanent plan of union which Benjamin Franklin, high in favor and influence as postmaster-general, had drawn up, to serve both in peace and war. Neither the colonies, however, nor the British Crown favored the plan; for there was too much of the prerogative in it to please the one side, and too little to suit the other.¹

Hence, naturally enough—for the success of the British arms with our loyal assistance in-

¹ Constitutional Studies, 79.

creased both the martial hardihood and the co-operative instincts of our colonists — the first attempt of Parliament to levy taxes without the assent of local representatives or of our cherished colonial assemblies provoked united protest and resistance. Spontaneously assembled at New York the famous Stamp-Act Congress of 1765, — a spectacle so ominous and alarming that Parliament and the Crown recoiled and for a brief time receded from their new endeavor. But when arbitrary taxation was resumed, with the attempted suppression of rebellious violence, our first Continental Congress met in 1774 at Philadelphia, followed by the second in May, 1775, after bloodshed in Massachusetts had begun; then by the third in 1776, which swept away the last scruples of a lingering allegiance, and on the memorable 4th of July sent forth to mankind its manifesto of united revolution for an independent United States of America. That manifesto — our Declaration of Independence — stands in its pronounced maxims as the one grand historical document whence American government derives its united ideals and inspiration.

Yet this Congress had taken up arms at the outset not to vindicate abstract rights, but to redress practical wrongs; and revolution and independence came to us in the main as the logical and unpremeditated result of a hostile resistance. For after resort to the arbitrament of violence, as Jefferson reminds us, victory can seldom rest with wiping out the temporary wrong, leaving the opportunity as before to inflict new ones.¹ Most wars, once entered upon, confound expectation, and like an earthquake

¹ 7 *Jeff. Works*, 74.

shock change or destroy existing fabrics, so that men re-erect or repair with quite another scope of vision.

We have never since, as a people, ceased to recognize a Congress for the whole Union with powers, larger or lesser; and the Continental Congress, while assuming the full functions of a General Convention, annually renewed, formulated a plan of confederate union meant to be permanent and contemporaneous with declaring independence. But delays occurred in this more difficult and distracting work; and meanwhile, for nearly five years following July, 1776, that Congress itself, under a practical delegation of authority and an annual renewal of membership, held the original States by a sort of *de facto* alliance — revolutionary, perhaps, in character —, maintaining a continental army under Washington, borrowing money, issuing a currency, and seeking abroad foreign aid and intervention. At length by 1781 written Articles of Confederation were fully framed and adopted. Their main design, agreeably to their origination, was simply to invest this Congress, this small delegate body of a single house, with such power, stingily conferred, as pertained necessarily to the united exercise of an authority already sanctioned. It was as though to navigate for the future with a chart, where men had been piloting as best they might without one.

Little is really known, or by this day cared for, concerning the authorship of these Articles of Confederation. The work was most likely a composite one, worked out in secret committee rooms and in

Congressional discussions behind closed doors. Here was to be found no distinct Federal Executive, no distinct Judiciary. A one-chambered Congress, whose delegates were yearly chosen by thirteen State legislatures, much like our present Senators, and voted as a unit and not individually, large and small States alike, was no great advance in political design from boards or standing committees or the projected Grand Council of colonial times. Its members, however illustrious, might gather in a room of very moderate size. And all the more did this Continental Congress resemble a colonial board of commissioners, inasmuch as it sat as a secret body, publishing no report of its debates and gaining neither buoyancy nor direct guidance from public opinion.

Amendment became imperative; but the unanimous consent of the States was requisite for all amendment whatsoever, while in fact the selfish perverseness of a single commonwealth blocked all change. Union, with so large a measure of State sovereignty and reserved right had proved difficult enough under the pressure of a common war; that pressure once removed and peace secured with a common independence, the ill-contrived scheme could not prevail at all against distinctive State ambition. The grasp of this Congress became nerveless, failing its war powers, its allied army; that inviolable observance "by every State" which it nominally stood upon proved but a paper guaranty impossible of enforcement; and hence the Confederacy, our first deliberate attempt at sovereign co-existence, fell to pieces.

Out of the temporary chaos came speedily and

most admirably that better Union which under our present constitution has grown gradually and yet steadily to gigantic strength and greatness. I need only remind the reader that, with an efficient authority which supplanted the old Congress by a two-chambered legislature consisting of Senate and popular House, and with an Executive and a Judiciary added, a general government was created which borrowed various features from the original State constitutions, at the same time that many of the powers and provisions newly enumerated adopted language and ideas of the late Confederate instrument.

Under the benign operation of that Federal constitution and its administrators, our American Union of 1789 has come to rank high among the civilized powers of the earth. I have called this government a federo national one; not strictly federal, nor strictly national, though each new accumulation of practical force tends in the latter direction. Such prodigious exercise of delegated functions as making treaties and dealing with foreign nations, acquiring and regulating a territory so vastly expanded already, conducting peace and war, keeping up an army and navy, creating and admitting new States at discretion, taxing for a common revenue, regulating foreign and interstate commerce, and holding under all emergencies the common purse and sword, must inevitably tend to centralization. Yet, on the other hand, this constitution concedes the vast residuary powers of sovereignty which belong to the separate States or the people; Congress in its

Senate preserves the image of the old confederate equality for States large or small; and though the apportionment of its House is based upon representative numbers throughout the whole Union, so, too, as an offset, is all direct taxation of the people. The powers of Congress, moreover, are specified and defined; taxes or duties upon State exports are forbidden, as also the preference by regulation of commerce or revenue of the ports of one State over those of another. The discretionary power of each State, in methods of national choice, is constantly so great that, as Mr. Bryce, a keen English observer, has remarked, this Union might have grown into an oligarchy or an aristocracy, had not public opinion under separate State direction enlarged the suffrage and resolved it into a democracy instead. The choice of a President of the United States does not to this day depend upon the aggregate popular vote of the Union, nor ever should it; for the true safeguard of State autonomy, if not of national poise, demands that a numerical count so vast for total reckoning be never the criterion of executive title. State rights, with State and local limits, are regarded too, in distributing the judicial powers of the Union; nor is constitutional amendment permitted except upon formal reference to the several States. Finally, — for the constitution as it left Philadelphia in 1787 was not on the whole acceptable without some further amendment, — all denial or disparagement of other rights retained by the people is expressly forbidden, and the powers not delegated to the Union, nor prohibited to the States by this instrument, are reserved by express assertion to the States respectively or to the people.

Herein may be seen an advance in expression upon the Articles of Confederation, whose reservation of sovereignty had clearly been to the several States alone. It was nominally "we the people" who ordained and established by this latter instrument the "more perfect Union," and who have since, collectively for the Union or distinctively in the name of the separate States, kept the great residuary sovereignty of this Union to themselves. "To the States respectively or to the people:" no better phrase than this, read in our fundamental text to this day, can emphasize the fact that this constitutional Union of ours is rightly what I have styled it—neither a confederacy nor a complete nation, but a composite of the two.

I have spoken of our State judiciary as arbiter and interpreter of State constitutional law.^{*} A corresponding function, and a broader one, devolves upon our Federal judiciary, whose crowning tribunal is the Supreme Court of the United States. For our Federal instrument makes its own pronouncement of individual and reserved rights, and of the powers of Congress and the general government. This constitution, with the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, are proclaimed the supreme law of the land. And hence a last appeal to the judiciary of the Union, whenever legal conflict arises and a fundamental grievance is affirmatively shown. Europeans often wonder that Federal and State courts can work together in upholding so intricate a jurisdiction, but, as English observers admit, the system of Federal supervision

^{*} See. p. 130.

works, and now, after more than a century, works smoothly.¹ For America's fundamental principle is that the supreme lawmaking power resides in the people, and that whatever they fundamentally enact binds throughout: so that, whether in State or Federal application, that which is unconstitutional transcends the formally-expressed will of the people.

The written text of our Federal instrument, except for the three great amendments born of fraternal bloodshed and two minor changes of much earlier date, stands as it stood in 1790, while Washington served his first Presidential term. Whatsoever our expansion since as a people, in condition or circumstances, flexible interpretation of that text as sanctioned by the Supreme Court supplies almost the only variance. Surely as a united and re-united people we have passed from the era of primitive simplicity. The old dogmas of State nullification and secession are never likely to be brought forward again to strike a chill into national integrity. Already do they gleam faintly like far-off beacon lights from the headlands we have left behind; they cannot illumine our future. We navigate wider seas; our present projects are world-wide in their comprehension; the golden mean of influence over a single continent ceases already to satisfy us. Aggrandizement among the strong powers of the globe is the new ambition, and international collisions are the likely consequence. State and sectional severance, then, if attempted in the far future, will

¹ Bryce *Commonwealth*, 245.

probably be, not to intimidate and defeat the whole Union by asserting a State sovereignty superior to it, but rather so as to save from some national wreck wrought through foreign wars — to propagate new germs of liberty in partial alliance or re-combination, as did Europe after the great Roman empire fell asunder, ruined by its own conquests. Nullification, therefore, means henceforth no more than rebellious defiance of wrongful and oppressive conduct by the ruling powers, as in the days of the Stamp Act. Secession remains simply that sacred right of revolution which is inherent in every political community as a last resort. Both State and Union are bound by reciprocal limitations of written law which each should respect, and we are far remote from the Hamiltonian ideal of a central government, conceding nothing to lessen its own supremacy save in matters municipal. Though the lust of world's dominion swells within us, we still vibrate between State and United States authority, like Galileo's pendulum; and the just admonition of past experience, past policy, may yet restore us to an equilibrium.

We have already a Union, even for continental limits alone, far greater in area, resources and population than any of the founders of this government imagined. The opportunity passed when Louisiana was annexed, to protest that the compact applied only and exclusively to our original territory as originally bounded. In our onward progress and expansion since that date force steadily gathers in the central sovereignty, to the detriment of State discretion and local self-rule. Yet State rights, State sovereignty, in due subordination must re-

main still precious; nor should we be deterred from upholding them by suggestions, such as we hear to-day, that States cannot stand alone, that national supremacy in all things is to be the watchword of the future. We should, however, well consider wherein the counterpoise to consolidation may be most effective. States themselves should be impressed with the importance of harmonizing their habits, their legislation, their institutions, as much as possible, and of respecting one another in matters of mutual dealing. State rivalry, State exclusiveness, ought not to dictate in the concerns of marriage, divorce or inheritance, in modes of business, in taxation, or in granting or restraining corporate privileges. Local citizenship should be cherished, besides national citizenship; the spirit of interstate comity should be kept up; local self-rule should give stability to local institutions. State remonstrance, State sympathetic action, may still avail much. Neither in State or nation, nor among individuals should political wisdom, generosity and considerateness be suffered to lapse.

In fine, our present co-ordinate system of sovereignty is admirable in its adjustment, if we justly and honorably apply it. I have elsewhere advocated a liberal latitude of construction, wherever amendment proves difficult and the written instrument of government, general in its expression, permits of different interpretations. But not for a moment would I concede that a mere change of circumstances justifies any ruling power in disregarding the plain intent of a written constitution or even of a written

statute, in its reasonable scope. Nor should any department of government encroach upon others. To say that we may interpret the people's mandate by present interest or desire is to falsify law altogether. Repeal, modification, substitution, the legitimate change into something else, is the only way to keep popular government from merging into Cæsarism — from replacing convention or legislature by a sovereign manifesto.

It is a healthy sign when we find people given to a fair discussion of their constitutional rights and disposed to consider what they ought or ought not to do, in view of the limitations set by the written charter they live under. And all the more so is it in a compound system like ours, where infringement by State or United States is equally forbidden. In the earlier years of our national growth, discussion was constant among statesmen as to what the constitution did or did not permit; Hamilton, Jefferson and Madison led the debate at one stage, Webster, Clay and Calhoun at another. For however men might differ as to the law, they meant loyally to stand where the law would sustain them. But in these later times the written limitations of government are but little debated or dwelt upon; we do not consider what is prescribed but what we want. The object of rulers, like that of moneyed magnates in financial or industrial schemes, is to force a way, to achieve, or to use the current phrase, "to get there"; so that if plans antagonize court process is played off in a headlong fight for the mastery. Such signs indicate degeneracy.

Let us come back, then, to written fundamentals. No free government can be preserved, says Virginia's

bill of rights, "but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." In other States of the Revolutionary era — Pennsylvania and Massachusetts, for instance — we find a like expression used in their original instruments, and "frequent recurrence to fundamental principles" enjoined. It is that recurrence — that calm reconsideration of the principles upon which our political fabric rests, in its two-fold combination,— that American statesmanship needs now to cultivate.

CHAPTER VIII

THE DISCIPLINE OF LIBERTY

IT has been well said that liberty's omens abound in every age to inspire mankind, while yet the discipline of liberty remains always difficult. Indeed, that ideal state of existence where one may move as he pleases, free from outside constraint, physical or moral, we mortals, each and all of us, long for and imagine, in certain moods, yet never wholly realize. For, though the impulse of liberty is deep rooted in human nature, convention — not to add divine ordinance — puts limits upon its exertion. No one can take the world for himself alone. Each member of society must respect the rights of all others with whom he comes in contact; and even this is irksome. Man in a crude state of development differs not greatly in his fondness for freedom from the lower types of animate creation, except that their earthly masters are himself, the dominator of the whole brute kingdom, while his own world rulers are from among his fellow-men.

We affirm of animals and their species that all are wild by nature; that man has tamed certain types only, for his appropriate use in life, leaving the rest to range and wander free and unsubdued, save as he may seek to hunt and capture, on the one hand, for his wants or entertainment, or to destroy and exterminate, on the other, as pests hostile and of-

fensive to the human race. And whatever may have been their order of subjection as among themselves, from lion to jackal, it is only as the tamed species and their progeny grow up to useful service among us as domestic animals, — like the horse, the ox, the dog, — or are otherwise deprived of natural liberty for man's consumption or use, that we pronounce them the lawful objects of human ownership at all. Hence, if the untamed and unreclaimed brute, once caught and confined, regains once more its original liberty, our property laws cease to apply.

So is it in a measure with ourselves. That same wild state of natural freedom, subject to no other human compulsion under heaven, we feel was our own rightful and original condition. And each of us longs in his inmost soul, at seasons if not incessantly, to escape society and authority altogether and once more roam free from all subjection, all responsibility to fellow-men, owning only nature for a ruler. When distressed or discouraged, weighed down with life's burdens and disappointments in a career, one seeks for solace in the pathless woods or by the resounding seashore, leaving society for solitude. To the lonely toiler of the deep, habituated to sail and oar and the broad face of waters, the land's teeming soil cannot long give pleasure. Our log-cabin settlers in the once remote Mississippi valley brought up their families, a century ago, far from the haunts of fellow-men, until, as was said, the sight of the smoke curling up in the air from some other habitation, miles away, became a sign that the world's population was coming too close and that the pioneer's household must move still on-

ward. For, besides individual solitude, is that of families, of mated companionship. And thus does the quest of liberty, that innate and distinctive desire from which no man lives wholly free, more than the beasts of field and forest over whom he lords it, turn back individuals from social civilization and manners, to relapse into native savagery and wildness. Our last census shows that more men than women live this nomadic life among us; for though woman will sacrifice to make man a home, her tastes and needs lead her more naturally to refined surroundings and to companionship.

How this craving for freedom may make one a voluntary outcast and outdweller by choice, in the midst of civilized society, Scott in one of his novels has illustrated. I refer to that scene in *Quentin Durward*, where the hero of the tale, conversing with a Bohemian vagabond, thus sums up their discussion: "You are, then, destitute of all that other men are combined by — you have no law, no leader, no settled means of subsistence, no house, no home. You have, may Heaven compassionate you, no country — and may Heaven enlighten and forgive you, you have no God! What is it that remains to you, deprived of government, domestic happiness and religion?" "I have liberty," replies the Bohemian; "I crouch to no one, obey no one — I go where I will, live as I can and die when my day comes. . . . I can always die, and death is the most perfect freedom of all."

Conceptions of liberty like these, though often approving themselves to the fancy, prove absurd

for a practical application in life. They furnish no rational basis of philosophy for schemes of human amelioration to rest upon. Their promptings are savage and selfish; they are at war with society, with social philanthropy; they furnish forth an individual, highly egotistic, who would sweep the earth clear of all fellow-beings in order to occupy it for himself and absorb the spoils. All that might mitigate the harshness of such a theory would be, that the theorizer stands for simple wants and simple modes of life, for lopping off the false excrescences of social luxury. That spirit of freedom which gives a true progression to our race proceeds rather from a sympathetic soul, from friendship, from family and social affection, from an intense love of country and fellow-countrymen, and from devotion to their common welfare against external foes. Animating impulses like these have supplied the world with bright exemplars like Tell, Epaminondas, Washington, wherever success, and not disastrous failure, has followed patriotic effort.

True liberty, then, comports with the spirit of self-devotion, and the wish to achieve a genuine and rational co-freedom for fellow-men. And in that latter aspect we may well inquire into the nobleness of the cause itself for which a country's independence is invoked, and whether the result is to be a people's betterment or a people's woe — a freedom that advances or a freedom that degrades or annihilates.

We of America sentimentalize over the poor Indian who once roamed unhindered this vast domain by right of occupancy as primitive holder of the soil. So far as involves a regret at our failure to

assimilate that dusky race for participating in the rich blessings which we and our posterity, as sons of civilization, enjoy, such a sentiment is generous and honorable; but to wish that so vast a surface had been left unreclaimed and unproductive to this day, in order that scattered tribes of barbarians, armed with bow and arrow, might have kept it as a hunting-ground, would be foolish. And were the prior tenants of so rich a domain the proudest among mankind, liberty for the world must have been the better for their supersedure. Not individual liberty alone, nor that of clans, families or tribes, taken by themselves, is what society must most regard, but the liberty of peoples and nations in the aggregate, the needs and welfare of our whole human race. We are not to cherish the liberty that preserves to one or to a favored few, be they savage or civilized, the right to appropriate this earth's enjoyment, in disdain or disregard of all others; but that state of society in which the common good, the common independence, the highest advancement of the great ends of human existence, may be secured. Any savage and secluded life among mankind must be the rude, the undeveloped or the exceptional one; its spirit may serve as a corrective, a sedative, for ills and irritation that we experience in our normal intercourse. The change from social fellowship to solitude may be curative, now and then, like any change of scene from city to country, from home to foreign lands. The sick at heart may seek seclusion as a medicine; but perfect personal independence at all times is neither good in itself nor granted to any one. Solitude is selfish and wars with the needs of society.

Nor is the constant hermit the truest Christian, for he lazily avoids the wrestle with life which tests real religion and makes for individual discipline.

Assuming, then, that liberty in human society is subject of necessity to constraints, let us ask ourselves how far such constraints may be pronounced just and reasonable. The constraint or hindrance of one's liberty may be either physical or moral; it may affect his person, as in depriving him of life or imprisoning him, or it may affect his character, his property, his free choice of a career. Freedom of the will to do or not to do a particular thing according as one elects is in a measure essential to individual liberty or freedom. Yet if you navigate a river you must steer clear of other vessels. And once more, the external constraint or hindrance put upon a man may relate either to his actions or to his expressions; as where one may not, under the law, violate the person of his sovereign, and more than this in some countries, may not even say freely what he thinks of such a potentate. In a legal and practical sense, human liberty means freedom from all external hindrance or restraint except that which the lawful rights of others, as defined by sovereignty, prescribe. For the rights of various individuals collide, in the pursuit of human life, and, to use a phrase of these days, where one man's rights end those of another begin.

First of all, as a rational restraint upon the exercise of an individual's selfish wishes, comes



nature with the revealed mandate of the Almighty. One of the most difficult problems of life is to reconcile man's own free will with the moral necessity he is under of conforming to those permanent plans of creation whose ultimate scope and purpose he cannot comprehend. It is somewhat as we perceive in the lives of our domestic animals, who move about, eat, sleep and regulate their routine instinctively for themselves, yet all the while are made to subserve the hidden and far-reaching schemes of some human proprietor which must affect their future. Yet in this latter instance an external physical compulsion is visibly exerted, while as to man himself, no such positive direction is clearly perceived, but one inches along his earthly span, warned that in a life to come he will be judged by his earthly record. For God's constraint upon humankind is essentially a moral one; we feel, but we cannot see, the controlling hand. We bear chastisement, discipline, the lessons of affliction and sorrow, whose occasion or end are but dimly surmised; and it is only by heeding the compass of that delicate monitor, the conscience, that one may keep anything like the true reckoning for a mortal career. Nor does conscience itself always register accurately. We have upheld in our land the liberty of conscience, the right to freely exercise one's preference in religious worship and belief. In this latter age, however, as I sometimes think, they who would dispense with religion altogether, take to themselves the chief glory of tolerance. They would pervert liberty of conscience to freedom from conscience altogether; choice in religious creed or forms of worship, to exemption from all worship, all creed.

But the world cannot long live wholesomely without religion, nor can just ideals of liberty leave a regulating conscience out of the scheme. That very word religion — or, if we prefer the synonym, moral obligation — imports that we are bound, in a sense, by firm though invisible ties of duty which would check each individual's wild and wayward disposition to turn hither and thither, catching the breeze of inclination, to fulfil some sinful impulse. Acknowledge or refuse acknowledgment, as we may, obedience to the divine will is still the injunction upon mankind. Supreme direction imports a rightful check, in every age, upon all human schemes of liberty. That eternal regulating force which impels us onward, in its own chosen direction, enveloping our own wandering and feeble efforts in its calm and irresistible supremacy, is hard sometimes to apprehend and acknowledge. But conviction comes to us, now and then, with a simple lesson from nature. Take a holiday tramp, some bright summer's day, through fields and meadows, and then lie down for a rest upon the green sward, shaded by a spreading tree. Look up, as you recline, at the blue arching canopy above, and you perceive that serene motion of the sphere which had projected you forward during your walk and bears you along still steadily in its own unchanging path, whether you move or repose.

"Where reason fails with all her powers,
There faith prevails and love adores."

Those of us to whom God's constraint does not appeal must at least confess that there are laws of nature, so-called, which place invisible bounds to

man's liberty, and for whose transgression each offender is liable visibly to suffer. If we yield to self-indulgence in the baser appetites, sickness and disease result; if we tread carelessly upon a loosened rock, pain and injury follow; if we place ourselves in the path of some swiftly-moving machine, we are killed instantly. In all such respects man's freedom is circumscribed and immunity of the person is the privilege of no one. Punishment and retribution follow transgression; absolute obedience must be rendered to nature's warnings and injunctions as to the *ipse dixit* of a Creator whose laws are fixed and immutable. I, for one, do not believe that scientific investigation is going to bring materialism as a finality for the race; but sooner or later science will find reconciliation with religious faith.

The next grand constraint upon individual liberty is imposed by human laws and government, and of this external clog upon our rights we see and feel the weight constantly. "Liberty" says Montesquieu "is a right of doing whatever the laws permit; and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow-citizens would have the same power." Civil liberty, then, — liberty in organized society, — is a liberty that comes guarded, defined and protected by law; and the best of civil governments are those in which the law confines itself to just and rational constraint or security, and affords in all other respects the largest permissible range and freedom to individual choice and selection. But to live outside of civil regulation altogether is per-

mitted to no one; the so-called outlaw or self-exiled member of society is a felon, a reprobate or a misanthrope; all the inhabited world's domain is ruled and regulated in the name of one sovereignty or another.

There is, as we all apprehend, a wide distinction between free and despotic governments — between that civil authority which gives ample scope, inviting the love and coöperation of the community, and that which compels submission with a rod of iron. In some stages of society and under certain conditions strict discipline is found indispensable. When we cross the ocean to-day, in one of those monster transports whose tonnage grows with each new construction, we become conscious that, hidden from our view, as not so greatly in former years, a strongly organized force directs the navigation through the deep by night and day, watchful yet external to us, and visibly attentive through but a few of its servants to our daily wants. We may trust its efficiency but we cannot supervise or inquire; all we can do as passengers is to pursue our own mutual entertainment, — to eat, sleep and while away the time, and confide in that special intelligence to which our lives are for the time committed. Such is the epitome of government to which the generality have submitted in most ages of the world and in most countries; happy enough, if rulers were competent and kind. They supported the establishment by tithe and taxes, as we by our passage money; they, if offenders against authority, would suffer discipline, and so would we, in a sense; blunder or inefficiency at some great crisis, on the part of such despotic direction, might to them bring

ruin, and to us death and a watery grave. To be sure, the analogy is not complete. The subjects of a rigidly overruling government may be held for their whole lives and in all their private concerns, while our submission is but partial and temporary, limited to the one accomplishment of a particular journey; they may be conscripted to fight for their rulers, while we stand clear of responsibility; they pursue for a living their private occupations, while we are left to our idle leisure. They cannot call their rulers to account by any means short of a revolution; we, if aggrieved, may seek redress in a court of admiralty when we get ashore.

But the relation of the subject or citizen to his government has varied in the world's experience. John Stuart Mill, in his learned essay on Liberty, lays it down that, while a struggle between liberty and authority has been the most conspicuous feature in the history with which we are earliest familiar, the struggle in old times was between subjects or some class of subjects and the government itself, while now, the ruling powers being largely chosen, the contest is rather for more and more people to have political power. Such a change holds true in large measure; yet, as it seems to me, no line of distinction in this respect can be so closely drawn. Government at all times is the symbol of immediate circumstance; and in governments not based originally upon a written charter, sovereignty established itself after a somewhat fortuitous manner, amorphous in synthetic conditions. The monarch has seldom ruled absolutely; he has rather gathered about him a privileged set, or caste, such perhaps, as birth best unites in administration; and to this set, attached to the throne

in influence, men from the common ranks gain admission because of pre-eminent service and aptitude, civil or military.

The ancient republic fell. But in mediæval times our representative idea came into view, whereby a community might gain its coherent share in government, instead of lapsing into nonentity or bringing to bear upon organized authority with what effect it might a ponderous and disordered influence. This representative idea, reinforced by that extension of popular elections under which representatives themselves are accredited, immensely affects civilized government in recent centuries. In the power of a people to choose delegates and to revoke at intervals the authority they have delegated, many believe that the problem of efficient government among mankind is finally solved. We see to-day the successful operation of such a principle not only in European republics but in European monarchies of the limited kind.

Here in our own land we have advanced to a point where democracy has grown wise enough through education and temperament to conserve its own interests. And to this end, the calm and deliberate adoption of written fundamental instruments intrenched liberty strongly at the start. We have long chosen representatives of the people to make the laws; we have maintained local self-government; we elect, in the several States, not representatives to the legislature alone for both houses, but, well-nigh universally, high executive and even judicial incumbents. And yet, as I have in-

timated elsewhere, we are not wedded, as a people, to the representative idea as the perfection of popular intervention in affairs. What we seek and hope for, still further, is direct participation to an extent which may make representatives and public agents more strictly accountable to their constituencies. For, on the whole, a democracy may be thought stronger, if intelligent, when its policy is conducted out-of-doors, so to speak, than under the stealthy management of an Executive such as once involved us in a war with Mexico, for territorial aggrandizement and gain. Under any national establishment like ours, where administrations change periodically and opposing elements are free to make searching criticism, long schemes of secret diplomacy are of difficult fruition.

I would not be thought to contend that in a republic the expressed will of the majority should rule in an absolute sense. When public opinion is left to its natural course, there is an ebb and flow to its pressure: majorities are but temporary and yield to persuasion hither and thither; a registered numerical vote is but the contemporaneous index of an open agitation or discussion as to leaders or measures, whose conclusions may hereafter change. Hence minorities have rights which deserve to be respected, and no majority should seek to pre-empt the blessings which properly belong to the whole people. If this be true of political parties in general, it is true none the less of a particular party seeking to elevate certain leaders or to accomplish a definite end. Each honest minority is entitled to consideration and possesses rights which the majority is bound to respect; for the state or other organization seeks

properly the good of all combined therein. Majority direction upon such a principle is a practical convenience, but the absolutism of a majority is intolerable. True civil liberty, therefore, demands a concession to minority opinion — not a timorous yielding, such as blocks efficient action at a certain point; but yet concession and, above all, tolerance. And hence, too, consistently with the theory of a majority rule in affairs, we have largely admitted for convenience that election which admits to authority the candidate who has received only a plurality of votes; not meaning, however, that the people or their majority shall come under the yoke of a plurality despotism.

Such a thing, then, as perfect individual liberty — to take the world as we now find it — can hardly exist, even in the human sense. Wherever we go we come in contact or collision with other men's rights and with a civil authority to which we must submit. Upon man's civil rights I have elsewhere enlarged — life, liberty, property, the right to a home, a marriage mate, a family and a pursuit of his own; I have discussed, besides, his political rights, whether as simply a citizen or as a participant in public direction. All such rights are definitely and liberally safeguarded in our land; for American institutions are modern and were framed under an enlightened modern conception of man's relations to civil authority. Napoleon the Great once said of his French fellow-countrymen: "The people do not care about liberty; what they want is equality." And Herbert Spencer, approving such a dictum,

has expressed his personal belief that neither French, English nor Americans understand the true principle of liberty. But our present concern is not so much with prevalent opinion, false or true, as with opinion that ought to prevail; and surely no such apothegm should justify any despoiler in denying to his people one right which they deeply need while permitting them another. "Liberty, equality, fraternity" — this was the glowing epigram of the French Revolution; and though men lost their self-control when seeking to plant themselves for the first time on such a basis of philosophy, that maxim, despite all thwarting efforts, has at length vindicated itself in France with sufficient permanence. We see it to-day inscribed and re-inscribed upon the churches and public buildings of that romantic people, emblematic, like the tri-colored flag, of a rekindled glory. And that triple maxim serves well for our own countrymen, and for every earthly government, in fact, which rests upon the attachment of the people. Liberty, equality, fraternity: not liberty alone, nor equality alone, but the aim to intertwine their progression; nor liberty and equality without fraternity added, for in this sympathetic bond of brotherhood consists the healthy blend of all lives contending for equal opportunities into a strong and harmonious whole. Liberty itself, in a sane sense, does not vaunt its indispensableness; nor does it oppose any one's eccentric wishes to the safe and consistent progress of the whole community. In moderation lies the path of public safety. "Real liberty," wrote Alexander Hamilton, when advocating our constitutional plan of 1787, "is neither found in despotism, nor in the extremes of democracy, but in moderate governments."

Individualism is the pronounced tendency of English institutions, and still more emphatically of those Anglo-American. Each inhabitant should be left free to work out a career. Such a development of society stands in marked contrast to that, under imperial discipline and initiative, which Germany, among civilized and prosperous nations, fosters under her self-asserting monarch at this day. "The worth of a state in the long run," says Mr. Mill, "is the worth of the individuals composing it." And that truly English philosopher stoutly insists that a government should not dwarf the souls of its inhabitants, but give scope to each one's attainments. Anything like a bureaucracy, he thinks, stunts all growth; hence just limits should be placed to public interference with the personal preferences of citizens. And he lays it down that an individual is not justly amenable to society for his actions, in so far as these concern no one but himself; while, *vice versa*, he admits that for such actions as are prejudicial to the interests of others an individual is properly accountable and may be held liable to social or legal penalties.

But how far, in the application of such a doctrine, are we to regard the interests of others who live under an organized government? To argue, with this eminent writer, that the only purpose for which power should be exercised over any member of a civilized community, against his will, is "to prevent harm to others," might mean to others, simply as fellow-individuals, or to others collectively, in the interests of the whole state. Fitly, as it seems to me, the interests of others should serve for constraint upon the individual in either sense. Sometimes, too,

the true interests of the individual should be protected against his own desires. And hence Mr. Mill's illustrations do not seem convincingly put. One should not be arrested, because drunk (so he contends), though otherwise with a drunken soldier or policeman, because the latter is violating his especial duty. The privacy of one's house, I admit, is not to be invaded, where the drunken man inflicts no harm upon others of his household nor disturbs the peace outside. One's home is his sanctuary, or at least his castle. But a drunken man on the streets deserves arrest, whether as a menace to others and a disturber, or because of his own helpless exposure to maltreatment; though in the latter sense a policeman takes charge of him more for his safety than his punishment. Were an insane person thus at large, the reason for depriving him correspondingly of liberty in the interest of society and himself would be plain enough. And more than this might be claimed for society collectively, in not permitting the harmful and painful public spectacle of a drunken person — since one openly and notoriously intemperate is liable to become a vagrant, a pauper, or a criminal, and such a sight on our streets offends the public morals. If this be true, all claim of a personal liberty to live and act as one pleases, provided he does not interfere with the actions or liberties of others, seems too extensive to be conceded. Adult men and women might claim thus the right to loose and licentious intercourse with one another, and even to flaunt their immorality in the face of society, provided such misconduct was mutually agreeable and confined to themselves. For the maintenance of good morals, of fit education and example for the

young, or even of healthy sanitary conditions and police, any government, I conceive, has the right to subordinate the license or liberty of individuals to liberty, in its widest and fairest scope, as comprehending the high-advanced freedom and welfare of the whole.

As for those more indirect methods of discouraging drunkenness or other vice in a community, the question of rightful infringement upon individual liberty is open to much debate; but in any case, I conceive, those in the minority on questions of competent legislation must yield, while preponderant opinion is against them, and obey the laws like good citizens, while endeavoring as they may to bring both laws and opinion hereafter to their own side, as discussion continues. Mr. Mill admits that the government may rightfully check a pernicious trade, like that in opium, or may place a traffic in deadly drugs or explosives under prudent supervision. In dealing with intoxicating liquors, to be sure, we find more difficulty. The people of continental Europe, we well know, though addicted to their beers or light wines, make temperate use of them; hence they might justly resent, as an infringement on personal liberty, all public effort to check or forbid indulgence in such liquors. But in our northern countries the use and gross abuse of alcoholic stimulants go frequently together. Scotland is a realm where the influence of Robert Burns and his poems has been so great as to hold back public prohibition in such direction; and in one or another of its chief cities I have seen young sons and daughters, at the close of some holiday's sport, taking their reeling gray-haired sires in charge

amidst a fuddled and good-natured throng at the railway station, whose aspect was one of the saddest I ever witnessed. The brotherhood of man may thus degenerate into an enfeebled brotherhood of toppers. In England you will see a fighting and quarrelsome crowd, rather, under like conditions. Here in America, where excessive drinking on occasion was the one prevailing vice, a century or more ago, the cause of temperance has made great advance in later times, and society is vastly better for the change. To a large extent this is the result of voluntary self-restraint in the individual use of liquors; but more still it comes from society's increasing ban upon the unconstrained in such appetites, and from laws concerning the traffic itself, which tend to check the liberty of self-indulgence. It is no longer the custom of college students or a rollicking gentry to drink until one or another boon companion rolls under the table; manual laborers have largely ceased to make of each recurring holiday a frenzied spree, regardless of wife and family. I am not myself a total abstainer; but I believe most heartily in the encouragement of individual temperance after one method or another; and in that sympathetic example, moreover, among fellow-men, whereby one denies himself lest he make his brother to offend. Where taxes are to be laid, I am willing that fermented drinks should be burdened, not less than luxuries. I recognize, too, the good which local-option laws have wrought in dealing with the temperance question, whereby the test may be applied to towns apart, according to the differing sense of a local majority. For in some homogeneous rural community it will often be found that the individual

finds no assurance against temptation except in total abstinence and prohibition; while among the incongruous elements of a large city, where differences of taste and association must be more liberally deferred to, public regulation by license makes the better preventive, and moderate drinkers may stand together. By either method, as discriminatingly applied under different social influences, the cause of true temperance is positively advanced. And, on the whole, the true correction of a vice, which lies, after all, only in excessive indulgence, in abuse, is found in bringing the social example of a community to bear upon the weaker brethren.

So strong, indeed, is individualism in our Anglo-Saxon race, — the desire to do and to earn each for himself — that the establishment among us of a community to supplant all private and personal ownership seems too remote for serious consideration. True, an envious majority, enraged by the growing inequality of private fortunes and iniquitous means of obtaining them, may trample down wealth or make blind effort to build in combination a business of which they are practically ignorant. But this can hardly amount to more than impoverishing society throughout and compelling individuals to start anew to make a living. Would we be really happier as a people, if there were no such thing as private property at all? If each and all of us worked, as commanded, for a certain moderate period of our lives, and then for the rest of the time was maintained in enforced idleness — in an honored pauperism — at the common cost? Where is that

solace that comes to toil when wife, children, family are ignored and an individual ambition to rise in life and do great things furnishes no mainspring to activity — when all men are to be alike in reaching some dead level of prosperity?

Bellamy's prophetic fiction haunts a reader's mind by its fascination; but the present life is not to be satisfied by grand parks and pleasure grounds in common, nor by hearing at one's own comfortable home, by telephone or graphophone contrivance, sermons and orchestral concerts whose real stimulus should consist rather in the atmosphere of congregated friends and brethren. How is organized endeavor to bring about its surpassing results of public wealth and luxury under these conditions? For in all such experiments a sort of divine omnipotence, virtue and wisdom is looked for in bringing such results to pass. Gonzalo plans an island where all shall be equal in condition and happy, and yet he would be king of it. Our new observer in "Looking Backward" does not trust his revolutionized commonwealth to a successful democracy, to a government by the people, nor even to a Union which admits State counterforce into its orbit; but his centralized authority moves irresistibly forward by a sort of military mechanism, each individual being assigned his place arbitrarily to work out an appointed part; while its chief executive, the President of the United States, is to be chosen, not by the whole people, but by retired pensioners and veterans alone.

This is not liberty, self-government, democracy; but, instead, a sort of complicated tyranny with benevolent intention. Wherever we see, to-day, or

think we see, the spectre of communism, it is mostly as a red-handed, destructive force, hateful of all discipline, madly jealous of superior means or station, brutal and murderous wherever it may gain the mastery. And, on the other hand, psychologists point out as a fact in human nature, that one of the first things a new-born infant shows is a sense of personal possession — that this or that toy is "mine." Even religious enthusiasts who have taken the vow of poverty hold firmly by their own pet animals, books or ornaments. And thus is the desire of property, of exclusive ownership, shown to be natural and universal.

True benevolence imports the desire to share with others something which is superior in ourselves. And that socialism which is genuine originates not justly in those who have no possessions to bestow, but in those who have them and are moved to relieve and distribute generously.

All government, in fine, implies authority, a supremacy over each and all individual action in the name of the whole; and even when we speak of a government by consent we mean this. Laws, be they collectively imposed by the fiat of a people, or by accredited representatives of a people, or by the long sanctioned ukase of a czar, bind the inhabitants individually; and the very fact that some positive rule is prescribed for general observance is so far a constraint upon the liberty of individuals. And, more than this, individual liberty yields not to law alone but to the force of public opinion. How strangely does prevalent custom, prevalent

habit of thought, change in some respects. The hated, the persecuted of one generation, becomes the saint, the exemplar of the next. For the strength of the people in a commonwealth, the strength of republican government, lies not in the supreme wisdom of the many, nor in their steady consistency; but rather in their constant sincerity of purpose, their honesty, and the adaptation of their views to immediate ends. Prevalent opinion and feeling are no positive assurance of right; and hence we educate the young morally and intellectually, so that when they become responsible citizens they may be better fitted to cope with the new and perilous problems of social existence. What we call the judgment of history is the calm and deliberate verdict which posterity in general renders as concerning the past, and though this be seldom positively reversed it may vary with new proof adduced or even with new impulses and beliefs in those who serve upon the world's jury.

Yet civil liberty becomes fitful in a republic through lapses of civil vigilance, and remedies are sought by way of retribution where preventives should have been earlier applied. And thus do we find it at the present time, where the task has grown formidable through habits of indolent and permissive relapse. The popular mind is impressed, not so much by a general exposure of wrongdoing as by concrete instances of malfeasance. And having focussed their displeasure upon specific cases of wrongdoing, their wrath is terrible and retribution comes like the vengeance of heaven. And thus does civil liberty assert and re-assert itself in the commonwealth, even when fitful and occa-

sional vigilance takes the place of that better vigilance which never sleeps, never is basely diverted.

The ideals of individual and of united liberty should be cherished and preserved. "It is not history," writes Amiel, the Genevan, in his Diary, "which teaches conscience to be honest; it is the conscience which educates history. Fact is corrupting, — it is we who correct it by the persistence of our ideal. The soul moralizes the past in order not to be demoralized by it. Like the alchemists of the middle age, she finds only the gold that she herself has poured into it." Liberty in submission — it is that which all humanity must at last concede. How grand an ideal — how noble a problem to be worked out. For it is not enough that man worships himself — his body, his brain, the fibre of his mental and muscular strength. To hold high one's purpose, one's destiny — to exalt, under all circumstances of oppression or disaster, the star of the unconquerable will, the ideal of a personal liberty absolute, inviolable, master of all space and all eternity — this is to partake of those vital attributes with which the Supreme Being has endowed mankind, the perfected creation of the universe; nevertheless it fails of the perfect truth. A liberty which rejoices in such limitations as are beneficent only, — which seeks to conform to the ultimate conception of immortal truth and owns its accord with the will and purpose of the Great Founder of the human race — this, after all, is the only rational liberty which should guide our lives.

CHAPTER IX

THREE DEPARTMENTS OF GOVERNMENT

OUR Revolutionary sires pursued steadily the idea that the three great departments of government — Legislature, Executive and Judiciary — should be kept forever separate and distinct. This idea found prompt expression in Virginia's bill of rights, and other States of the old thirteen embodied the maxim in their written instruments. The final paragraph of the Massachusetts declaration is in phrase stately and sonorous: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers or either of them: the judicial shall never exercise the legislative and executive powers or either of them; to the end it may be a government of laws and not of men."

Applying the same idea without dogmatic announcement, the framers of our Federal constitution gave bolder practical range to such separation of powers than any State instrument of earlier date, and exemplified before the whole people the wisdom of doing so. To this very day fundamental separation and independence are upheld constantly; the maxim appears and reappears in our later State

constitutions; nor has modern political science devised any radical departure from such a theory.

The maxim itself one constantly associates with Montesquieu, whose "Spirit of Laws" circulated among our colonies in an English translation during the Stamp-Act times, its learned author having died a few years earlier. Montesquieu was a wide traveller and an accomplished scholar, combining the quick and profound penetration of a Frenchman with the urbanity and ease of one well-born and independent in fortune. Of him it has been said that he charmed, instructed and never offended; that he lived simply and gave his large leisure to the edifying of his fellow-men. His famous essay, the ripe product of international research and observation, was the quintessence, so to speak, of political ideas ancient and modern; and British institutions, which he had studied admiringly on British soil — himself the liege subject of a French monarch as long as he lived — doubtless influenced him. England herself inclined somewhat to the separation of powers; and Sir Henry Vane, some thirty years before Montesquieu was born, was seen pleading to Cromwell that the British executive and legislature should be kept apart.¹

Indeed the recognition that fundamental powers should be separated accompanies fitly every establishment of popular government as liberty's peculiar guaranty. The Greek Aristotle, in his *Politics*, had distinctly defined to the ancient world the three appropriate departments of a republic

¹ Vane's "Healing Question" (1656).

as deliberative, executive and judicial — a description imperfect, only because legislation in a representative instead of a collective assembly had not then been invented. It is only as the ancient republic disappeared by absorption into the rule of the strong and masterful autocrat of the next and mediæval period — the Cæsar, the Kaiser, or as we best know him to-day, the Czar, words all one and the same in etymology — that such an idea lost its appropriateness. Yet in the sequence of modern historical events and their development, we of America may well identify this maxim by the name of Montesquieu and congratulate ourselves that colonial government, as administered here by Great Britain while British supremacy lasted, embodied a distinct type of separated powers which we ourselves wrought presently into a form more symmetrical and more enduring, to suit ourselves.

It is not, however, the separation alone of powers for which free government contends, but their consistent independence of one another in political action. And it was this latter respect in which the Montesquieu maxim failed most of application abroad in Montesquieu's own day. The monarch or protector — the Charles Stuart or Cromwell — the British king's provincial governor here in the American colony — was often seen at variance with the legislative assembly; which assembly alone, or a single House of Commons, whether at home or in America, represented as a rule the people. Hence we find Vane, in the seventeenth-century tract which I have referred to, contending in clear opposi-

tion that the executive power should be even subordinate to the legislative.

At the present day Great Britain, through the agency of a ministry, rules the realm after some such theory as this last. The monarch no longer strives individually against Parliament to maintain his prerogative. For ceremonious state, to be sure, he still holds court, and he makes ceremonial appointments; but his sceptre is held in trust by a ministry which defers absolutely to the legislature, or rather to the Commons. And such was the inclination in most of our American States when shuffling off the coils of colonialism; to the local legislature of one or more houses was committed the control of the other two departments, as the people's exponent *par excellence*. But New England colonies had known something in practice of an executive and legislature both equally derived from the people, notwithstanding British authority; and hence Massachusetts in her constitution brought out forcibly, as we have seen, the idea of making the three great co-ordinate departments of government independent of each other as well as separate,—all of them being derived from the people, the true fundamental source of political authority.

Such was the idea, in fact, which by 1787 had made such progress in this new world that the written constitution for our whole Union applied it confidently. In that grand instrument of government drawn for the combined people collectively of the commonwealths, we find the Legislature, Executive and Judiciary organized as decidedly distinct and independent in their operation though co-ordinate. Such finally has grown to be our

native conception for State and United States schemes of government alike: all sovereignty lodged essentially in the people; all three of the grand departments responsible apart and fundamentally to the people, both practically and theoretically. For in theory even, far in advance of full practice, did our lovers of liberty recognize that all sovereignty resides originally as of right in the whole body of the voters.

Both independence and separation of these fundamental co-ordinate powers, therefore, is America's teaching of to-day. But this, let us bear in mind, applies merely to the organization of a republic, a commonwealth, or a union of commonwealths. When we deal with municipal or other local public corporations within a commonwealth — with cities or counties as we have them at the present time — no such three-fold separation of governing powers seems needful or desirable.

The first three articles following the preamble in our Federal constitution distribute the fundamental powers of government, though without dogmatizing, conformably to the Montesquieu maxim, as States had already done, but far more boldly and appropriately in some respects than any State had hitherto seen fit to apply the precept. And here, as States themselves had set an example, the Legislature held the first place in classification, preceding the Executive. The somewhat later constitution of the first French Republic gave to the legislature the same precedence; and this, says Paine in his "Rights of Man," is the natural order of things.

Indeed, in England's political philosophy, two hundred years or more ago, the legislature seemed almost synonymous with popular sovereignty itself. Locke observes of legislative authority — and Hooker before him had written to the same purport — that this is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have placed it. For neither separation of powers nor the right of a people to define by fundamental charter was well comprehended by those writers. Parliament had already become the great representative body in England, so far as the people were represented at all. In the House of Lords sat the successors of those mediæval barons who had wrested from King John the Magna Charta, with bishops and nobles generally who were close to the royal court; but modern prestige attached rather to the House of Commons, whose nearer derivation was from the people. Yet these commoners, whether members or voting constituents, were mainly English freeholders, — the yeomanry, — men devoted to land and to the principle that taxes ought not to be laid and collected without their tax-paying assent. Trade or the wealth derived from commerce and mercantile pursuits, though taxed, was hardly yet represented in that body; and still less was the laboring class who paid no direct taxes at all. But social progression since the seventeenth century has made wealth powerful, however derived; manhood suffrage and recognition of the moneyless toilers coming also, but coming last and slowest. The House of Lords and House of Commons in Great Britain were of separate origin and establishment.

We should bear well in mind that the ancient world had no conception of a government vested in a body of barons and nobles; much less in a legislative assembly composed of representatives of the people.¹ A plebiscite or popular referendum gave general sanction to laws in the Roman republic; while various executives of somewhat abnormal origin served as checks upon each other in the name of one set of people or another. But there grew up a Roman Senate, with elders of wisdom and social supremacy who assembled for deliberation, as the medium through which all affairs of state had to pass. Hence the dignified name of senator comes down to modern times with a mixed meaning, as appropriate whether for council, on the one hand, to approve or support an executive policy, or, on the other, so as to review the legislation of a larger and more tumultuous assembly; in either case giving poise and stability to administration, whether imperial or popular. Senators might be appointed by a monarch or chosen instead by popular vote; but in either case their selection was for high distinction and their body was small comparatively and disposed to discuss and deliberate in secret. Adaptive-ness must be the inherent trait of such a gathering; and hence among the grand vicissitudes of Roman history we find the Senate in earlier times the bulwark of family influence, the proud symbol of republicanism and champion of the people; but in liberty's later and degenerate age, the mere mouth-piece of an emperor's proclamations, with neither a plebeian mass nor a powerful aristocracy to give it coherence, and having only the semblance of dignity

¹ Mont. Bk. XI, c. 8.

and a traditionary glory to justify its prolonged existence.

The Roman comitia, or formal assembly of the whole people, worked well enough while Rome was unpopulous and contracted in territorial space; and so with aggregate gatherings in the various small republics of ancient Greece. But as Rome expanded into Italy the real and the spurious voters were hard to distinguish, and the popular assembly became a mob, tumultuous and disorderly, whose passions were played upon by demagogue orators and their wills misguided by organized plotters with corrupt and cunning schemes of their own to carry into operation. For crowds that assemble to be convinced may yield unexpectedly to passionate impulse.

Local self-government affords the primary school for popular sway in a state or national jurisdiction, and it is there that all training for free citizenship should commence. Such self-government prevailed in Great Britain in the times of the Stuarts and it took ready root in our several colonies when transplanted by British contemporaries who settled here. But to take our own town or county meetings of the inhabitants, Americans went far beyond their British progenitors at home in bringing vote, debate and public resolutions to bear upon immediate politics. Our colonial legislatures were clearly representative of the town or county constituencies which chose to such a body. In Great Britain, on the other hand, as Trevelyan tells us in his *History of the Stuarts*, Charles II, despite the exile of his youth and the tragic death of his father, struggled for an absolutism which might altogether dispense

with Parliament, as in France. The very plan of representation in England's third estate was not plebeian in that epoch so much as squirarchal. But as to town or county units of self-government, British suffrage, such as it was, set up mayors, aldermen and the lesser dignitaries for local administration; and so, too, in these colonies from earliest times, selectmen, town or county clerks and treasurers, and the minor functionaries in local affairs down to hog reeve and constable. Yet, whether here or in the parent country, one gave otherwise his vote — usually by word of mouth — simply for the representative of his constituency to serve in assembly or convention, and there his self-governing capacity in general politics ended, except where the right of the voters to meet locally and instruct the local representative was recognized besides. Such is the apprenticeship, such are the journeymen of democracy; and as Tennyson describes those earlier simple constituents in his own land:

“ They think the rustic cackle of their burg
The murmur of the world.”

Within such narrow confines, while the highway or school tax or a bailiff's court might engage the voter's zeal, most broad operations of the government soared proudly above him, save where, by resolutions in public meeting or on the next polling for the legislature the will of a representative might be coerced or influenced. In America a local candidate for the legislature came usually from among his local fellow-citizens. But in Great Britain, under the practice prevalent to this very day, one might

be chosen to the House of Commons whether living among his constituents or a non-resident; and hence an English ministry, in Sir Robert Walpole's time, found boroughs ripe or rotten for returning such partisans as it needed; while to a date very recent almost any aspiring University man with money and influence might work his way into Parliament by employing an attorney in some convenient district which he had never seen, to conciliate old families, manipulate the voters and conduct a canvass for him.

The historical origin of our legislature is obscure. Most likely the Lords and Commons sat formerly together in Parliament, but afterwards separated. The lords or nobles were most intimately allied with the king, but deputies or burgesses gained great advantage through the power to grant and originate supplies and subsidies. Great Britain's Parliament corresponded with the States General among continental nations, such as the French monarch convoked in 1789 after the lapse of a century and three quarters. Blackstone, citing the Wintenagemote under the old Saxon heptarchy, and the diets of Germany, Poland and Sweden, opines that general councils of a sort were coeval with the English kingdom itself. At all events, King, Lords and Commons grew into a joint mechanism of government in that country, all change of relative authority coming by slow precedent.¹

England has its "King, Lords and Commons," in the familiar phrase, by way of a combined legisla-

¹ 1 Bl. Com. c. 2.

ture. Anciently, it is said, the King of England enacted laws with the advice of his council. Statutes were then based upon the humble petition of the Commons, which the monarch answered with the advice of his council; and from such petitions, as entered on parchment rolls with the answers subjoined, judges drew up all formal enactments. During the reign of Edward III the joint right of legislation in the King and the two Houses of Parliament was first established firmly, and by the close of Henry VI bills were at once introduced in the form of acts according to the modern method.¹ England preserves to us (1) the unwritten common law of custom immemorial, as defined by decisions in the courts; (2) the statute laws, written and recorded, of the legislature itself, which transcend all custom. Judges cite precedents so as to trace the course of custom through centuries, while Parliament in its omnipotence orders absolutely, at any session, whatever is not naturally impossible. "It may do anything," as some have said, "except to make a man a woman or a woman a man;" nor is even that exception sure. Custom or the common law, for aught we know to the contrary, may have been largely derived from ancient enactment, from statutes gone to dust whose origin and purport are lost to history.

What interests us to observe of the modern British Parliament is that, while the influence of the House of Commons has vastly gained, that of the House of Lords, or peers temporal and spiritual, has lessened, and that the King himself by present

¹ 1 Bl. Com. 182. Dwarria Stat. introduction.

custom can only approve or disapprove absolutely what the two Houses may have agreed upon. To originate revenue bills and to devise and frame all schemes for taxation is the grand peculiar function of representatives of the people. The House of Commons will not allow the Lords any power over such measures but that of accepting or rejecting; amendment is prohibited. Herein American practice takes a wide departure. As to our Congress, the Senate so freely exerts the right to amend, that at the present day it will supplant positively what the House has of right originated, and in conference compel its own substitute. In States, too, the time-honored privilege of a House loses its force, for that body is no longer the sole exponent and representative of the people's will as common in colonial times, but each branch of such legislature virtually represents the people; and hence, our State constitutions, many of them, permit revenue bills, like any other legislation, to originate in either branch. Of the executive veto as America knows it to-day I shall speak presently; our statutes are usually completed by an executive signature; yet, most assuredly, the power of President or governor to approve or disapprove bills absolutely does not and never did exist in free America. According to Blackstone, however, King, Lords and Commons made in 1775 the combined Parliament of the British realm; and, despite all opinion or practice to the contrary, the English have adhered to that principle ever since.

I have alluded to the omnipotence of the legislature, as our forefathers regarded it in Revolutionary

times,¹ when such a body seemed the sole palladium of the people. Our united concerns were long carried on by a Continental Congress of a single house, which in a sense assumed the functions of a small and secret convention. The turmoil of a single-chambered body was perceptible in Pennsylvania and Georgia before the first stage of American commonwealth had run its course; while clumsiness of action with the encroaching and aggrandizing tendency of all legislative bodies, whether consisting of one or two houses, grew conspicuous. Patriotism, like loyalty, attaches itself in the long run to individuals who lead and inspire, and not to the combined mass of an assembly; men thrill at concrete and personal achievement.

Representation applies at the present day, under our State practice and theory, so as to make both Senate and House of a Legislature, and the Executive besides, representative of the commonwealth, by one aggregation of voters or another. That once happy composite of the many and one, for a contrast of Senate and House in the United States Congress, finds no counterpart in the homelier political fabric of the States themselves; to offset property representation to that of numbers was once tried locally but it proved unpopular. The arithmetical census plan, which in our own day creates artificial and changeable districts in place of the old social constituency of town and county, strains local pride and affection to the utmost and takes from representation much of its pristine pride and dignity. The village Hampden has passed. Yet to take the political drift as it now looks to us, periodical

¹ *Supra*, p. 137.

DEPARTMENTS OF GOVERNMENT 195

apportionment by numbers with scientific exactness in districts periodically defined, seems the basis destined for our democracy through centuries to come. With voting inhabitants leaving the old rural environs and grouping in cities for a residence, as they do so greatly in these days, anything like the old system of town equality in politics or an unchanging apportionment by numbers becomes intolerable.

Concerning Congress, the text of our Federal constitution remains unchanged to this day, and in the exercise of a wide and supreme discretion our legislature at Washington manages the vast and increasing business of the nation after rules and methods of its own which each branch is at liberty to change. Continuous sessions of Congress we have scarcely known; hence one long session of indefinite length alternates usually with a short and over-crowded one; and hence, too, extra sessions or prolonged regular ones serve for emergencies only. The anomaly of our whole national system has thus far been that elections and the responsible work of those elected do not fit together; both long and short sessions find excuses for postponing action; and to make incongruity worse, a new Congress, with its newly chosen House, seldom meets to organize and take up business at all until more than a year after public opinion has expressed itself at the polls. Hence the representative of a district takes his innings at Washington almost forgetful of what his constituents had chosen him for, and intent already upon the chances of a next

election. The more vast and perilous its responsibilities, the more dependent does Congress become in consequence upon the shaping of its work in secret committee rooms or through the pressure of a masterful clique.

Democracy has done stronger work in our modernized State constitutions. A popular dislike of legislative dominance in affairs — of all caucus and log-rolling methods of government — began to appear early in these instruments; and most of the hampering constraint imposed to-day upon that department aims to correct abuses which became manifest. State workings are watched and State constitutions remain open to speedy amendment, aside from mere statute. Both legislature and administrators enter promptly upon their work after the people have chosen at the polls, and legislatures are mostly urged to hold brief and unfrequent sessions, despatching the public business. Constraints increase of late years rather than diminish; and reform is upheld, not by new States alone, but by many of the oldest and most conservative of the Union. In short, what an eighteenth-century legislature might have chosen to do or leave undone, under its own repealable rule or enactment, the fundamental law in most States now commands peremptorily. If it be objected that all such hampering provisions show an increasing distrust of the people's representatives, their wisdom or honesty, we may reply that distrust is generated among a supervising constituency, confident of its own better understanding how free government should be conducted, and well assured of its own inherent honesty, and its capacity to give instructions. There is

DEPARTMENTS OF GOVERNMENT 197

scarcely a change, such as I allude to, in legislative power and procedure, which is not on the whole a change for the better.

I have elsewhere commended the popular initiative and referendum as a developing factor of modern government by the people.¹ Whatever tends to instruct and interest the great body of inhabitants in guiding their own politics and political destiny deserves encouragement. But the people themselves should be interested and well-informed, for close participation in such direction, and not merely honest and well-intentioned. It is chiefly as to constitutions and constitutional change that general initiative or referendum may admirably apply; for a whole commonwealth may most fitly discuss and decide upon the basic institutions they are to live under. But as to legislation, voters are not so readily informed, so interested or so capable of discriminating among the mass of proposed measures, as honest and intelligent representatives such as any constituency may have put forward on its behalf; nor is the actual choice of unworthy representatives to sit in House or Senate to be condoned by thwarting their deliberate enactment at the polls. Hence initiative, if compulsory in legislation, may prove destructive of orderly government; while referendum, even at a legislature's own instance, seems best applicable to acts of purely local reference or for local option, or where the whole commonwealth is aroused and positive concerning its own wishes. In this latter case an Executive veto may often apply

¹ *Supra*, pp. 84, 139.

the corrective to bad legislation more impressively and convincingly than any referendum vote on a popular submission. Public opinion, moreover, may best prevent or shape legislation of stirring interest, by public meetings and public instruction of the local representative; for all legislation, to be good and safe, should conform to the wishes of represented constituencies, rather than to that of the commonwealth at large, in any test by majorities. Once more, in any State, emergencies may require that action by the legislature be prompt, certain and irresistible; and in such a case any popular initiative or referendum proves obstructive and mischievous. Just as too meddlesome a public regulation of business is sure to ruin it by disheartening private energy and investment, so may sporadic interference by the vast body of voters with the responsible agents of the public, legislative, executive or judicial, bring efficient government to a stand-still.

Now as to our second grand department of government, the Executive. In American conception, it is some individual citizen, clad in the full panoply of official power by his fellow-voters, who inspires, if at all, as their chosen guide. Revolution was fought and won by our forefathers without such delegated guidance for the whole Union; and yet they felt it in the person of that superb fellow-citizen and Virginian who, placed in military command of our united forces at the outset, was never superseded, and surrendered nothing but his own commission, nor that until peace with independence had been secured.

DEPARTMENTS OF GOVERNMENT 199

And thus came into being that prime national incumbent, now of immense power through little more than a century's space, the President of the United States. Our Federal constitution confers upon him strong powers, strong independence. He is sole representative of all the States, of all our people, in their combined majesty, under his credentials of election. He holds public intercourse with other nations, supervises the mutual concerns of a vast Union of States, rapidly growing in wealth, domain and numbers; he controls the patronage for increasing cohorts of civil office-holders, and posts great forces by land and sea as commander-in-chief of army and navy. He is moderately restrained in making treaties or the chief appointments by a Senate which may approve or disapprove, and yet cannot compel him to name a person or initiate a negotiation at its own behest. In short, the President of the United States is the prime and efficient factor and initiator of our national policies, domestic or foreign; and with the immense patronage at his command he may, if gifted with political tact and discretion, conduct effectively the movements of great national parties. Congress, with its own leaders typical of the various States, may, it is true, by laws fundamentally permitted, marshal and combine, so as to frustrate a personal ambition in this respect or compel a policy of its own; nor is the presidential incumbent himself always forceful. Washington led for the whole people, disdainful of parties; Jefferson, Jackson and Lincoln administered with vigor and were strong party managers besides; while Madison, Pierce, Hayes, and others, raised to supreme station only as secondary lights, yielded

for the most part to leaders abler for originating and left Congress to shape a policy for them.

With regard to the governor of a State, the first impulse of free America was to curb and restrain his deputed functions. For this Executive was mostly an inheritance from colonial subjection, and colonists had chafed under the arrogance of Crown officials. Hence, for the most part, outside of New England — where colonial governors chosen by the people had been exceptionally familiar — our governor was at once made subordinate to the legislature; and in eight States out of thirteen his very choice was vested in the members of that body. Pennsylvania's first executive was a sort of directory known as "President and Council." When popular elections came about, the rule prevailed far into the nineteenth century that elections at the polls should be by majority vote; and a mere plurality could not suffice for a popular expression. Hence, if no candidate for governor received a full majority of the votes cast, the election as between highest candidates was thrown into the legislature. Such a possibility to this very day threatens in turn the legitimate title of a President of the United States; and in the memorable instance of 1825 a minority candidate was actually chosen by the House at its permitted discretion. But States for themselves have quite generally adopted the plurality rule so as always to make the popular preference at the polls decisive upon a single test; and this, on the whole, seems wise.

We abhor the idea of making our Executive a life office; for at all times competent men can and ought to be found who will accept exalted station at

the hands of their fellow-citizens. American citizenship of itself qualifies for public life; and some of our ablest chief executives we have seen called to the head of affairs from private life with little or no political experience previously. Re-ineligibility after a fixed period of continuous service is the rule in many States. But some constitutions omit restriction in that respect; and so it is notably with our Federal instrument in its still unaltered text. Washington, however, set for his countrymen the just and memorable example of retiring from the Presidency after he had served two terms; and popular liberty will stand far safer if all successors make firm observance of such a rule, as they have hitherto done. Jefferson had objected in 1787 to the want of a positive barrier in that respect in our Federal text; his idea then being that a President should be chosen for a seven years' term once and for all; but, accepting the precedent set by Washington as an unwritten law to be forever binding, he commended, upon his own experience, the substitute, as he expressed it, of an eight years' service with a midway submission to the voters. To forsake past example so as to leave our Presidency open for successive re-elections would be, at this day, to set this nation on the high road to monarchy.

As time advances and the spectacle of a strong Executive makes deeper impression, even the governor of a State has gained in stability and independence as the people's tribune. The legislature no longer elects him; he, with the lieutenant-governor and such high officers, besides, as secretary of state,

treasurer, auditor, comptroller and attorney general, is now chosen at the polls as representative of the people in the broadest sense. Where at first elections were annual we find them biennial rather; and while a governor once stood for re-election after a single year, his term now extends commonly to at least two years; while, in about half of our States, he is chosen for three or even four years. Even in Massachusetts, where the old annual election still prevails, party custom favors a re-election for two or three successive years. Lieutenant-Governors are favored in States, after the nation's example of Vice-President; and this not so much, in either case, with a view to a contingent vacancy, as to conciliate conflicting elements and strengthen the party ticket at the polls by presenting a double front. While simply exercising his normal functions, the Vice-President or Lieutenant-Governor is a colorless dignitary, with neither substantial power nor patronage.

The trend of experience, State and national, has been to free the Executive from trammels of subordination to the Legislature. Both Executive and Legislature must depend henceforth upon the voters and public opinion, after their separate spheres of influence; and thus does representation of the people broaden considerably its original base. A governor is to take heed that the laws are properly executed. His salary cannot be increased or diminished during an existing term. He may convene the legislature on extraordinary occasions, make recommendation by message and adjourn that body whenever the two Houses cannot agree. He is commander-in-chief of the State militia. He ap-

DEPARTMENTS OF GOVERNMENT 203

points or nominates to office. The pardoning power, absolute or qualified, is conferred upon him in almost every State.

As for his veto power, this, too, may impose a salutary check on the legislature. Executive veto, in the absolute sense, has not been tenable here since the days of royalty; but a qualified veto appeals strongly to public opinion and to the sober second-thought, besides, of the Legislature itself, whose two Houses may on reconsideration by a sufficient vote — larger usually than before — pass the measure in question so as to take effect notwithstanding the executive objection. The “pocket veto,” moreover, is discretionary where a legislature adjourns before giving the chief magistrate full time to consider a bill; and under some State instruments a governor may not only veto items of an appropriation act, leaving the rest to stand unimpaired, but may hold his general approval in suspense for a stated time after the legislature adjourns, avoiding all unseemly pressure for his signature such as we still see in the closing hours of Congress. President Cleveland, who had been allowed such a respite while governor of New York, refused to go to capitol hill at all, as his predecessors had done, but required all the latest bills to be brought to him at the White House for approval. The exercise of the qualified veto power affords a dramatic spectacle; and nothing which the science of free government owes to native ingenuity compares with it in effectiveness for checking headlong experiment and compelling deliberation.

The third great department of our government is

the judicial. A distinct and efficient Judiciary for the whole Union was set up for the first time under our instrument of 1787, and made, after the Montesquieu formula, as independent and distinct in design as either Congress or the Executive. In the original States apart, that recognized bulwark of liberty had been built in colonial times; though the scope of its remarkable power in testing all acts of legislation by the written charter had yet to be revealed. Not to enter into technical details, I may observe that inferior courts serve in county or district divisions for the main burden of original litigation and supervise such police courts or magistrates as take the initial cognizance of petty matters; while original jurisdiction of larger concerns, besides all final appeals of whatever kind, whether in common law, chancery or probate, or upon constitutional points, are vested in a supreme tribunal which crowns and unifies the whole. Our Federal constitution established a Supreme Court — which in appropriate matters is the highest tribunal of the land, — while giving Congress full discretion to erect inferior tribunals from time to time; but now most State constitutions define specifically the State judicial establishment, placing it wholly above reach of any legislature.

Independence of the Judiciary has come to mean with us something quite different from what it meant with our ancestors. Its independence of Executive and Legislature was surely never greater than now; while, furthermore, judicial interpretation of a constitutional text, as fully recognized to-day, enables this third department to thwart and frustrate on occasion the will of either or both the other

two. But its former independence of the people, of citizens themselves, has largely disappeared; for equally with Legislature and Executive, the Judiciary has now been brought under the vigilance and control of constitutional conventions. And, more than this, advancing sentiment in separate States accords to voters at the ballot box the choice of all judges from highest to lowest, while judicial tenure itself is largely limited to a fixed term of years. Hence the Federal plan of appointment by the President for life or good behavior remains the grand relic of a bygone custom; for scarcely five States of the whole Union keep steadily in such respects to the old judicial tenure which we derived originally from the mother country.

Whether an elective judiciary, with service for a fixed term, be, on the whole, an improvement or not in political science, is still a mooted point. Small agricultural States, with a sturdy yeomanry, stand more favorably in this respect, it seems to me, than large commercial ones whose interests are vast and complex, and their inhabitants an incongruous medley. Federal jurisdiction, so vast, momentous and specialized in its scope of litigation, needs, most of all, stability beyond all reach of passionate politics; it would sink in self-respect and dignity were its high incumbents remitted to the periodical scramble of national parties and party nominations. In States, with their simpler spheres of action, all impulse tends to maintain the popular mode of election, once entered upon; yet we see already a decided leaning towards longer terms of judicial incumbency than were favored when the innovation began.

Such, then, are the three great departments of government as America to-day defines and distinguishes them. But government is never, of itself, a smooth and thoroughly consistent system; neither can the separation of Legislature, Executive and Judiciary be entirely and logically complete. All departments should harmonize and coöperate where public authority is to be well sustained, like a congruent chord in music. Hence checks and balances are applied to keep one department from encroaching upon the others and appropriating more than its due share of sovereignty. Thus, as we have seen, our Executive exerts a qualified veto and so far may check new legislation; and, again, our Legislature constrains the Executive by enactments which will bind, at all events, if duly passed over his veto; while his treaties and high appointments require usually a Senate confirmation. The Judiciary, through its power of fundamental interpretation, interposes a constant check upon both Legislature and Executive; yet the Executive may pardon and remit court penalties, and a judicial decree may sometimes fail of enforcement if army and navy be withheld. Moreover, the Legislature may impeach and remove both executive and judicial incumbents after its own process.

Government, in short, does not claim or reach perfection, but seeks rather to conform to the customs, the manners, the disposition and the inspiration of the times, of a passing age; and good government is, after all, but a relative term. Solon said well of the laws he had framed for the Athenians: "I have given them the best they were able to bear," and no wise lawgiver can say more.¹

¹ For further study of constitutional changes in these three departments, see Schouler's *Constitutional Studies*, Part III.

CHAPTER X

PARTIES AND PARTY SPIRIT

WE hear it not seldom asserted as an axiom that political parties ought constantly to contend in a republic—each watchful and critical of the other—in the common interest of the people. If this be true, it can hardly be thought a normal condition of affairs that keeps one of our two such organizations in national authority for forty out of forty-eight successive years, while the other spends most of its time in futile opposition. To me it seems rather that parties, through their representative character, naturally rise and fall, appear, disappear or reappear, in State or nation, according as immediate and practical issues change and divide the voters; so that when any political sect has once converted the great majority to its views and carried out the reforms which it was instituted to accomplish, dissolution follows absorption, and with general acquiescence comes a season, longer or shorter, of public tranquillity favorable to harmony and a welded patriotism. New or reorganized parties come later, under conspicuous leaders who rally their followers to promote new issues.

Such an era of tranquil subsidence followed our peace of 1814 with Great Britain and Napoleon's

downfall. That peace detached this young Union finally from European domination and set us forever free to sail our independent course in the broad ocean of destiny. That era, known in history as "the era of good feeling," which lasted about ten years in fact and embraced more especially the long administration of President Monroe, with its high ideals and recuperative energy — was perhaps the most singularly serene and harmonious, the most promotive of national warmth and affection that America has yet witnessed. Those years stand out, for the most part, with party passion surging on either side, before and after.

I have long believed, moreover, that had President Lincoln's life been spared through the full period of that second term for which he was chosen to serve, the year 1866 would have lifted upon another green oasis and resting-spot for our political caravan, a second era of national good feeling; with the olive branch and sectional reconciliation for permanent trophies. Old parties, old antagonisms, would thus have yielded place to the revival of attachment to that Union indestructible, whose first and foremost of political needs was a generous adaptation to new social and economic conditions. With his marvelous tact, patience and compassion, Lincoln would have sought, like the earlier Monroe, to assuage old animosities and restore general confidence; while keeping Bourbon leaders from reorganizing, he would have rested the government upon its friends, holding both radicals and reactionaries in prudent check; and in all this he would have carried the people with him. New racial issues following emancipation, such as negro suffrage,

might thus have awaited the educating course of time, opportunity and local conviction.

I go even farther and assert the belief, founded in a clear personal recollection of those times, that General Grant, on succeeding to the Presidency in 1869, might have brought in that same era of good feeling, such as the majority of both North and South desired at the time to establish; and this notwithstanding the unfortunate collision which had arisen between his next predecessor and Congress. He was indebted to no party for his first nomination; for the loyal voters of the country, regardless of political affiliation, called him to the chief magistracy, like another Washington. The real platform of 1868 was expressed in his own terse words, "Let us have peace," — which in truth was the substance of what plain citizens then hoped for.

I do not mean to disparage party spirit in a Republic, but what I contend for is the just subordination of all party spirit to love of country; and besides, that each party organization should adapt itself to circumstances and to the issues normally uppermost. In a nation like ours "Republican" is a good party watchword, and so is "Democrat"; but the name, the symbol of any party, should consist with adherence to definite and consistent aims. We rightfully organize a party, not for the sake of organization, but to promote some immediate measure or policy which we believe sound and salutary. A party which has no inherent principle left but that of the loaves and fishes has no good reason to exist; and men bound together merely

for the spoils of victory, who are divided among themselves in political conviction or are without political conviction at all, framing their plausible platforms with gilded phrases to catch unwary voters, are among the meanest of hypocrites, for their hypocrisy pretends to patriotism. "Measures, not men," may be a captivating cry. But men we should elect who stand for measures; who are devoted to the purposes and policy we desire and whose lives exemplify a sincere and honorable leadership. It is "men AND measures," "men WITH measures," that give to politics a vigorous vitality under free government.

And herein we may perceive a strong difference between sects as we have them in politics and religious sects. The political policies appropriate or attainable in the history of a nation or commonwealth may differ at different epochs; for a reforming zeal in the pursuit of government is directed to the immediate practical conduct of affairs. But a Christian sect stands for some particular creed or tenet; and fixedness on a certain point of faith and conscience is its real reason for maintaining a special organization at all. Says the Hampton singer, glorying in such a fixedness:

 " A Baptist I was born and bred,
 And when I am gone there's a Baptist dead."

But in this American world of ours we fairly acquiesce ere this in the idea of political equality, save as perhaps hindered by racial or sexual conditions. We are all Republicans, we are all Democrats; and to argue steadfastness to such and such a party as though it interposed some lasting fundament of

faith is to prove our own narrowness of vision, our credulity, at the cost of that better element of loyal citizenship which after all stamps the image essential. Republican or Democrat, then, may still be names to conjure with, but the essence of that conjury is deception; and if once their logical distinction was material in this country, it is material no longer.

Lord Rosebery, with something of a sneering cynicism, has observed of the English parliamentary system, in a recent book, that it requires for its working two sets of protagonists. One set, he says, does the administrative work of the country and defends what is done; the other is anxious to do that work and in the meantime opposes what is done. "To the one side all is white; to the other all is shade, all is black; there is no twilight and no gray."¹ If this statement be true it is largely so because English government sets forth Parliament as a grand spectacular forum, for debate and interpellation, — as a coliseum of forensic rivalry for the prizes of official station. Now in the United States we have a political system far different and far more complex. There is a national arena of politics and a State arena; the immediate representatives of the people are various and serve in various departments of government; the interplay of executive and legislative, or the executive conduct apart, interests and distracts; and neither Congress nor any State legislature can focus long the public gaze. Even the mayor of a large city may at times draw strongest the attention of the people. Yet something of that same cynical observation applies perhaps to our own party divisions when we distinguish the "ins"

¹ *Life of Lord Randolph Churchill*, c. XIII.

and "outs" — the men who absorb official patronage and the men who would take it from them. This is the *reductio ad absurdum* of political conflict; it resolves all contest for principle into a degrading scramble for place and promotion. And some of our politicians, we fear, have no higher purpose to carry out; they are advocates of whatever doctrine may best advance their interests and put them on the winning side.

The point I would most wish to emphasize regarding political parties is, that in their just course and scope they emanate properly from the people themselves and are organized by competent leaders of opinion to educate and combine voters for some public purpose of immediate importance; so that when training and discipline bring right results and the prime purpose has once been fully achieved, disbandment should be in order, or at least a period of furlough and inaction, until other measures of policy, duly formulated, other immediate problems induce new combinations with a new recruitment and discipline under correspondent leadership. By such means public opinion among a self-governing people takes its legitimate range and the preference of the majority consistently prevails. It is true that traditions and old habits of association keep men conjoined; the fame of dead leaders or an enthusiasm for living ones will inspire followers to continue the line of march heedless of a new direction; and, more than this, there may be something fundamental in the fact of party fellowship which inclines men to a permanent brotherhood. Yet all political com-

radeship for practical political ends is in its true sense but temporary; to one mood, one policy for government, succeeds another, as circumstances may determine; and all political parties should have a flux, an easy capability to resolve into elements, to combine or change combinations or recombine, as the times demand. Parties should not serve as fighters professionally, like permanent standing armies, but rather should enlist voters as volunteers or militia-men when the call and the emergency summon to arms; these serving like good citizens while the emergency lasts and then, like good citizens, enjoying the fruition of an honorable peace. Party, in short, is but an agency for carrying into effect the will of the people; for establishing and keeping up a genuine rule of the majority; and such a will, such a rule, should hold paramount in affairs with due regard to the policies immediately desirable.

Such was steadily the historical course of political parties in our national history through that long period of primitive growth and development which preceded the Civil War. The agency was employed on behalf of the principals. Here, as national events moved and national exigencies might require, through the space of some eighty years, party after party organized and moved into opposing line of battle, and then after some decisive campaign disbanded. The very names "anti-Federalist," "Federalist," "Whig," once potent, have passed out of our vocabulary. And so did that of "Republican," as applied in Jefferson's time; this, however, to be revived thirty years later for a northern resistance to slavery; the name "Democrat" having mean-

while been boldly assumed and appropriated by the followers of Andrew Jackson. And, during that same period which preceded 1860, other lesser parties of national scope were born and died — that of "anti-masonry," which abhorred all secret combination; that of "native Americans" or "know-nothings," its antipodes in working methods; the "loco-focos"; and those lesser anti-slavery combinations of short continuance — the "liberty" and the "free soil" parties.

But the shibboleth of "Republican" or "Democrat" has availed in national antagonism for more than forty years since the Civil War ended. Neither political sect stands clearly for the principles that it was organized and named to promote. Are these two political hosts of boasted name and lineage to antagonize still through centuries to come, unreconciled, undisbanded? Are they to take up new issues, each with forceful alacrity, upon which both followings are divided in sentiment, and on which neither can fight with full effect, while they prevent their rank and file from recombining naturally? On such measures of the day as tariff for protection or for revenue only, State rights as against centralization, Asiatic expansion, neither party has clear and pronounced views. Upon problems of negro advancement or Oriental immigration neither positively withstands the other. Each bids for popularity in noisy assaults upon corporations and in regulating owners by the non-owners. But concerning the relations of labor and capital otherwise, the disparity of wealth and other dangers of the day, both war drums give a muffled or deceptive sound. We are reaching a point where policies seem to

crystallize about a certain personage; and when we arrive there, it is time that, like Clay and Jackson in a former era, leaders among us who stand for definite and contrasting ideas should rally and recombine the voters to meet living issues.

In one of Anthony Trollope's novels of English Parliamentary life ² reflections are made upon the mimic nature of party encounters on the floor of the House of Commons, somewhat in the strain which I have quoted from Lord Rosebery; and this, indeed, some forty years earlier. There, statesmen contend politically for triumph and advantage, somewhat after the bland and courteous fashion of opposing counsel in a chancery suit. "It is not so in the United States," adds the spokesman of the novelist: "There the same political enmity exists, but the political enmity produces private hatred. The leaders of parties there really mean what they say when they abuse each other, and are in earnest." Trollope wrote this at a time when we were still in the throes of a moral struggle — of our deadliest conflict for national existence; and doubtless citizens North or South, Republicans or Democrats by designation, were clearly divided then in aims and opinion, and felt their division deeply. It is hardly so to-day; and yet at all times American politics come and should come closely to the people, who feel their own responsibility. Hence, at our periodical struggles for national preeminence and power, leaders of opposing parties, whatever their real pulsation, must respond or seem to respond to

² *Phineas Finn*.

the popular feeling, which is naturally sincere and often intense and passionate.

In all politics, party dissensions are largely founded upon the jealousies of class or social set. Rich and poor oppose, where distinctions of fortune are wide and the avenues of opportunity obstructed. Aristocrats are disliked by those they look down upon and dislike in return. And so, again, differences of temperament have their constant influence and even descend in families by the law of heredity; here is the conservative by instinct, who holds by institutions as they are and dreads innovation; and there, on the other side, is the innate radical, always discontented with the present, and seeking in change, of some kind, the panacea for existing ills.

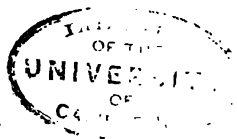
I would not be thought to belittle the positive importance of party organization wherever great ends are to be achieved. What I wish rather to impress, is that political parties are naturally no more than faithful agencies employed by the voters to effect some public purpose or policy which unites them in sentiment, under leaders zealous and competent; and that all parties should conform readily to the law of such creation. Organization, well accomplished, brings all citizens whose aims are alike into effective coöperation. Every educating and proselyting work needs a strong and sympathetic stimulus; voters must be canvassed, the doubtful argued with, the friendly confirmed, all who cast a ballot exhorted to united action. Meetings must be held, halls hired, candidates brought forward,

principles openly discussed and advertised. Good writers and speakers are needful in a cause, good managers of details. Or, if the movement is pursued rather as a still hunt for success, clubs and leagues must be secretly organized and brought into concert. Voters should be rallied to the polls on election day. All such work requires zealous and competent direction and an expenditure of money legitimate enough; yet high-minded citizens will give freely of their time and service to any such cause, while in an emergency honest presses will assist, and men of public spirit contribute voice or pen without the thought of a money recompense.

But let us draw the line at legitimate campaign and election expenses; for the prodigious sums which are to-day collected and lavishly and secretly disbursed by political managers at each important election — a large proportion, as we lately discover, solicited and accepted from corporation managers and fiduciaries — become already a menace in the land to liberty and honest government. Bribery of purchasable voters, graft for solicitors themselves, actual corruption at the ballot box or among the mean hirelings of politics, explain best such surplus outlay. Moneyed contributors, too, have schemes for corresponding gain to fasten upon those they oblige, — perhaps for corporate advantage but more likely for their own selfish hold upon the corporate direction. Grafters and jobbers, big and little, fasten like leeches to the corpus of an established party in power, pretending to be friends of the people. Here lurks the danger in our present political methods; strong belligerent forces contend, prodigal and dishonest in campaign expenditures,

violators and neutralizers of the right of suffrage, despoilers where they profess to promote the general good, perverters of the fight for principle into a roving warfare for spoils and dishonest advantage. Such party directors, instead of leaders of opinion, become opportunists in ideas; they watch to win, and, winning, do nothing for the public good but what they are compelled to do in order to keep a control. They trade off their influence; they make compacts to advance those greedily ambitious who have solid cash to offer; they use power despotically to compel discipline among compliant followers, and they learn to play craftily the game of politics with the cards stocked. The downward tendency of things in recent national years of accelerated wealth and luxury has been remarked by outside observers of our republican experiment; but a tidal wave may still be trusted, as heretofore, to wash out the sinks of iniquity at some indignant crisis; for the American people are still virtuous in the mass and cherish high principles.

In the stagnant and morbid pool of politics, such as collects when old parties decay and are devitalized of principle, stands the mechanism, labelled with some historic name, and in charge of the so-called party "boss." That Warwick of vulgarity makes study of the means whereby honest suffrage may be swamped by a floating and purchasable vote cunningly manipulated. His machine works easiest in the crowded city, where ignorance and vice vie with intelligence and honesty, where nobodies count numerically, and men of all sorts and conditions abound. He is, quite likely, a saloon keeper or turfman by occupation and knows how to



subsidize vice and sample the police business. With neither taste nor aspiration for social position, he consorts with the commonest and in a certain generosity with the downtrodden displays a redeeming trait which confirms his influence. Not without talent, he organizes in the shade the riff-raff of politics, while some keener and subtler intellect — an aspirant of statesmanlike calibre, were he only honest — marshals in the conspicuous sunshine and leads the promiscuous force to action. The boss claims his grosser reward in the hour of victory; while the honors of high official station and patronage go to the man whose intellectual preeminence makes him the more dangerous foe to his country. All alliance of such co-workers bodes to the people mischief irreparable.

Against the growing danger of party machines among us, with machine managers, one check to insist upon, at the present time, is that of publicity. Public opinion should thwart dishonest selfishness, and public vigilance exert a constant scrutiny. Not only ought party candidates to declare under oath what sums they have spent upon a given canvass, as various States already require, but political committees and managers, civic, State or national, should under heavy penalties, be forced to show sworn and audited accounts of their receipts and expenditures, that the people may ascertain what sums have been expended in each election contest. Perjury, to be sure, would still cloak many a dishonest transaction; but prosecuting officers and the courts might aid in a true discovery and the present reckless and irresponsible assessment and outlay would largely disappear.

Whenever a political party has sunk to that low level of degradation where the only real policy is to trim and tack ostensibly in order to keep in power, independence in politics may take its fair innings for projecting new reforms, new issues, traced in the coming horizon; for around bold leaders, bold aspirants, new combinations will gather. A young patriot of force and character looks into the future: he studies its aspirations, its hopes, its needs, and he draws the public, if he may, towards a higher plane of conscientious progression. What, after all, are the honors of public preferment worth, if government keeps to the rut of old routine, and the chariot wheels of state drag heavily on through the mire of corrupt practice? There is one and only one high incentive to a public career, and that incentive is to do nobly.

Independence in politics, however, is rather the attribute of that swaying portion of our voters who make their influence count for ideals, regardless of party discipline. They throw their weight so as to keep affairs at an equilibrium; they are honest citizens, most of all. They seldom undertake to live by politics alone. They do not even hold office, unless the office seeks them. They disclaim competition for the prizes of high patronage; they coöperate rather, at some juncture, with recognized leaders of opinion, by money contributions, by committee work, by appeal to the voters, by investigating the record of candidates, and by aiding as they best may by force of example the better cause against the worse. They make effective combinations. Unselfish in their attitude, they evince their patriotic spirit and disinterestedness. Occasion will arise

where political elements melt in fervent heat and the people may be roused to redemption as in the enthusiasm of a religious revival. But the arena of such new emotions may long be a contracted one; it may comprehend a single town or city, or a single State, before the reformation takes anything like a national scope. It is something, after all, in favor of a government like ours, that every one may exert his personal influence to direct its course.

That political independence precludes, or at least obstructs, a steady and successful leadership in affairs must be admitted. Parties, after all, change slowly enough for public aspirants to define and redefine their position or organize anew, and one who would rise surely in officeholding through successive grades and maintain his place must keep faithful to superiors and associates, and even at times be prepared to sacrifice his own preference at the party behest. This we concede with some sense of shame; and every true leader in these days who can accomplish good and yet maintain his party standing must be statesman and politician both.

The world has long recognized that in union is strength, through Aesop's familiar fable of the bundle of sticks. Combination wins in war where scattered assaults count for little; and this lesson applies to politics as on the battle field. The more that numbers multiply and the magnitude of social operations, the more do we find it indispensable to success in a given pursuit that resources shall be well organized and powerfully directed. All this gives a prodigious momentum in combination against which individual effort competes in vain. Hence the leaders of reform

must organize not less skilfully than their opponents if they would prevail on opportunity. Under provocation of misrule, good citizens will rise in their might and reassert first principles; but the danger is that their coherence may not last long enough to bring a permanent betterment. They get outwitted in unwonted combinations; after a half-victory they confide to inexperience the initiation of their plans and leave leaders in the lurch; and thus may men of the machine, their former foes, come from their lurking place and return to power, compelling concessions. Counter-organizers and protectors of the people should stand firm and compact until at least their own trusty representatives are masters of the situation.

We come nearly, the present year, to nominating national candidates for each party, who stand not only for the same dominant issues but for the same moods and temperament in promoting them. Yet if any national campaign is worth conducting at all, political parties and their leaders should oppose on real grounds of opposition, and one great element in society should find its exponent as well as another. In fact, the two great parties, Republican and Democratic, are no longer divided on definite principle; each is split up into radicals and conservatives, with corresponding views. But the old mechanism remains, and each Presidential aspirant seeks to capture one convention or the other, that he may have an old organization behind him and may appeal to the people as a legitimate candidate. Both the present agencies of the people have outlasted the issues that created them, and reorganization will be soon in order.

Next to organization for achievement in politics comes the inducement of voice or pen. In modern times the press has become a mighty engine, and we see its assistance invoked abroad as well as at home — and wherever, in fact, freedom of the individual struggles against the bonds of privilege. Yet political parties contended fiercely, here and in the fatherland, before the newspaper was known at all; and throughout our colonial and Revolutionary age the tract or pamphlet influenced opinion more strongly than did any periodical press. But conditions have since changed vastly. Newspapers are now industrial concerns with the rest, employing often huge capital, profitable if well conducted, and seeking profit with popularity among a wide clientage of readers. Their circulation in this country is nearly universal and the influence of each is commensurate with its character. We all read regularly our newspaper or our magazine, or both. And whether as a guide of public opinion or its cunning interpreter; whether to set the fashion or to copy and describe it; whether to instruct, elevate and chronicle faithfully, or to amuse, spread tattle and gossip and to debase by dispensing rumors, scandals and sensation together, the press is always accosting us and it has grown immensely powerful in the community for good or evil. All must admit that when a certain mood towards men or measures is reflected day after day in any publication, its circle of readers becomes greatly prepossessed in political thought, and often insensibly so.

The other great means for bringing men into political concert is oral exhortation. Speech irri-

tates to action; it flames and fuses the wills of a multitude stirred up by eloquent appeal. And thus has it been from time immemorial. But the orator's art is less potent in our own day than formerly; and to many it must seem as if the golden age of American oratory had passed away. No Webster, Clay or Calhoun holds longer a throng entranced and spell-bound in the senate chamber; no Pinkney, Wirt or Choate sways court or jury; no Lincoln and Douglas contend together upon the stump; no classic Everett or Winthrop graces the academic occasion. Never was more space given for address or speech than upon the constant occasions of our present day; never had we so many speakers on one subject or another. Yet the hearers are under a stronger self-control; we enjoy, we gratify our curiosity, we discuss coolly and critically the entertainment offered us. That form of oratory now so much in vogue, the after-dinner speech, comes as the supplement of a banquet which we order or pay for; and with repleted stomachs we lean back in our chairs to be amused or pleasantly instructed over our cigars, to hear some utterances not likely to offend our tastes or pre-occupation and certainly not meant to disturb our digestion. The speaker himself adopts the tone expected of him; he may be serious, but he begins by being jocular. And thus do we enjoy much able disquisition, much elucidation; and what we are most intent upon is pleasantly and dispassionately conveyed. Art, then, becomes of less consequence than formerly, where oratory is concerned; nor does burning conviction, if indeed the orator has it, kindle readily the ardor of others.

We, who listen, feel ourselves too nearly the peers of him who speaks; and speakers among themselves stand too nearly on a common level. In fine, we of this age are apt to be cynical in politics, accommodating; and an expressive verb "to enthuse" suggests the sly process which we suspect any one of applying with premeditation who seeks to arouse his hearers to zealous action. All this may be partly owing to the optimism of the age in which we live and to our unexampled prosperity. After all, it requires some threatening calamity, some sense of instant danger, for eloquence to most deeply move — Philip at the gates of Macedon, the menaced safety of a Union, the impending ruin of all our fortunes. When men gather close together in their common peril, with clenched teeth and faces pale, and some impassioned speaker among them, who feels deeply with the rest — a Patrick Henry or a John Adams — bids them stand firmly in the path of duty and sacrifice which he and they must tread together, then do speech and inspiration truly combine to induce to noble deeds.

Numerous accessories have lent historic effect, from time to time, in the political pageants of a republic. The cannon thunder, the brass bands, the shouters, the campaign songsters, the assembling crowds at some chosen rendezvous, the banners and mottoes, the torch-light processions, the illuminations and bonfires, the marching and counter-marching of well-drilled clubs — all these have helped on the enthusiasm of memorable campaigns. To-day we have more scientific appliances than ever before, to arouse or excite a populace; and with electric lights, racing automobiles and balloons

sent skyward, party names and candidates are emblazoned. All this, however, smacks too greatly of business advertising methods, such as exalt to fame a favorite soap or a new breakfast cereal. No true aspirant to public honors will care to make vulgar notoriety from being talked about.

Something remains to be said of recent improvements in electoral methods, such as check the wasteful energy of parties in political rivalry, through combined resources of the whole people. The best theatre for such experiments has been found in the several States. For in the lesser spheres of State activity, public opinion formulates better than in Congress and brings good wishes to fruition; and change, too, may be easier applied where amendment or repeal seems needful.

Here, first of all, the public or "Australian" ballot has won wide approval. One simple ticket, officially prepared and printed at the public cost, contains the names of all candidates to be voted upon, leaving the voter to mark thereon by himself under special safeguard the men of his choice and then, folding it over, to deposit it without disclosure. By this means, not only are party managers saved the cost and trouble of separate printing and distribution, but bribery or intimidation of the voter is mostly prevented. So, too, may independent candidates with a stated numerical initiative take their reasonable chance on the official list. Party distributors and spotters hovered constantly about our polling booths in former days. When tickets were written or printed under party auspices, it was seldom

hard to discover whether or not a ballot put into the box was the regular one. Voters might have been bribed or coerced, under such conditions, and bargains verified. But now each voter is put to his conscience whether pledged or unpledged; nor should it be thought a disadvantage that intelligence enough to mark names by selection becomes thus needful. However details may differ in different jurisdictions, experience will harmonize them upon comparison as time goes on; and there is not a State, I believe, where the official ballot has once been introduced, whose people would willingly return to former methods. The opinion gains everywhere that expression at the polls should be free, honest and confidential; that if good government needs good men to administer, it needs not less that the selection of those men shall depend upon the hearty preference of freemen, rich or poor, who vote by their conviction.

Another new reform in the States tends to supplant nominating conventions of the different parties and diminish machine dictation by what are known as "direct primaries"; the fundamental idea being for voters themselves to assemble freely at the polls to determine (each under his own party style) who shall be candidates for the regular election. Instead, therefore, of the local caucus or convention of delegates which gets so readily into the stress of dickering dictation, we have the direct and wholesale nomination of opposing candidates by secret ballot at the polls at the public cost and without representatives or delegate ma-

chinery at all. This change of methods is still in its early stage and its favorite application is to municipal politics; perfection of the reform is yet to be attained. At all direct primaries the status ought to be recognized of independent voters who train under no party banner but mean to vote, at any and all times, as patriotism and a sense of fitness may impel them. Independent combinations should be unobstructed. Primaries afford the people's own choice among the respective party candidates; they remit the party machine to its proper subordinate place, and hence the machine politician is against them. Wherever the plan works, men and principles more than party preferences gain ascendancy.

In some States present legislation on this subject indulges too greatly the idea that existing parties must needs be permanent, and that each citizen should vote regularly with one or another of the two great organizations in order to maintain his standing. But this would be to limit free suffrage expression and give to party what is meant for mankind. A voter's consistency is best maintained in direct primaries, it seems to me, where he is not compelled to announce himself as belonging to this party or that, in order to cast a ballot, but as simply intending to vote this time under a certain party designation; his nominating ballot counting, at all events, for one candidate only among party rivals, and hence deserving acceptance. Sometimes, but perhaps not often, we find the statute liberal to such an extent. Again, it is asked what should be done in case the primary ballot gives no one among rivals a numerical majority of the votes for party candidate.

In such a case, I think, a plurality of votes should determine; and most of the State enactments thus far adopt that convenient rule, deferring all further controversy to the regular election.

To extend the rule of direct primaries beyond State limits, so as to apply such methods to nominating nationally a President and Vice-President of the United States, would seem difficult, if not impracticable, with the immense area and population of our Union at the present time. Nor would such a plan harmonize with the constitutional principle by which our national elections are determined — election by State electoral consequence, instead of by aggregate population. Yet we have changed in national modes of nomination and are likely to change again. Nominations by a Congressional caucus, the earliest settled practice, passed into disrepute and disuse, some eighty years ago, nor did the plan of State nomination by State legislatures long satisfy as a substitute. National party nomination in convention, by delegates from all the States, our present mode, is already an expensive contrivance — not to add, loosely representative in character — and each new experience increases its cumbersome inconvenience. Such vast and turbulent bodies may delight theatrically; but impulse and accident, or else close manipulation, may dominate its results. The task of American citizenship in the arrangement of rival nominees is becoming too serious to be trusted much longer to a delegate discretion so capricious and uncertain, so unrepresentative, so liable to wire-pulling by those in official power, and, withal, so costly and burdensome to each opposing party. Some other method must

presently be contrived; and perhaps we shall best find it in inducing States to hold to their rights and substitute separate State primaries under some coöperative plan. Even now, and without Congressional permission at all, the electoral college of any State may vote for President and Vice-President under a rule of direct primaries pre-established by local legislation; and any State legislature may pledge its electors of rival parties to the dictation of a State primary as among such candidates. In a word, each State has power to determine constitutionally how its Presidential preference shall be expressed through its own electoral college.

Another reform is sometimes attempted for securing what we term minority or proportional representation in a commonwealth. Cumulative voting, with such an end in view, has here and there been favored; but such experiments have hardly yet reached a well-recognized practice. The rule holds good in a republic that government should be carried on for the welfare and happiness of all, and not of an existing majority or plurality alone. Yet, on the other hand, the ruling set favored and chosen to authority should have power to direct affairs, and leaders once selected by the people should be allowed and even forced to take responsibility.

Other minor reforms for eliciting a full and free vote at the public cost are maturing in the States: such as a careful registration of the voters; numerous polling booths and precincts, wherever a voting population is dense; the requirement of publicity in election expenditures; and, to give the official

ballot a freer range among candidates, special permissive nominations for its list by a stated percentage of the voters. All such methods make for honest politics and for the rule of public opinion as against party domineering. So, too, does the prudent use of voting machines, or patent ballot-boxes which register a count mechanically; though here the question is raised whether the language of a State constitution does not intend that ballots shall be humanly handled and counted. It is an ingenious age of ours, but surely a distrustful one, that sets automatic contrivance against the frailty of mortal man. Yet for public or private count and verification, the self-registering adder has come to stay.

No task for a commonwealth can be more useful, more uplifting, than to train intelligent citizens to exercise fearlessly and effectively the birthright of self-rule. Nor should any public expenditure be borne more cheerfully than that which eliminates or reduces such mechanisms as bossism sets up to obstruct a free expression of the popular will. In the reserved force of public opinion lies liberty's last refuge. Undemonstrative, indifferent, perhaps, in ordinary times, our people are yet observant of the drift of affairs, and on critical occasion their ballots give to good government the preponderance. And thus must it ever be while liberty endures.

CHAPTER XI

SERVANTS OF THE PUBLIC

THOSE familiar with our jurisprudence understand that the doctrines of master and servant and of principal and agent have the same general root in law; that the one relation originates in simple and primitive society, where the few who are highly favored have many dependents to minister constantly to their wants and wait upon them; while the other and broader relation belongs to the more advanced development of civilized intercourse, and suits especially those concerns of business which are founded upon intelligent mutual consent and a limited and distinctive scope of employment. Yet, whether nominally as agent or as servant, whether as one of the family or as one living in his own home, he whose employment comes under any contract of hire in these days is subjected to one and the same fundamental law, as to rights, remedies and responsibilities; and every one employed in a private corporation, from president down to janitor, is in a certain sense a servant to that impersonal master, as he is likewise an agent.

The word "servant" or "master" suits better an aristocratic state of society than a democratic one; and hence a milder synonym is coined for American households, to reconcile those once brought under the influence of our free institutions with those

unequal conditions which the relation itself seems to imply. We employ "help," "domestics," "house-work girls" in our homes. But, put the symbols as we may, we shall not escape in its wider scope that subordinate service in life to which most of us must conform in order to make a living. And merely as a domestic institution associated with husband, wife and children, I thoroughly believe in the good old-fashioned relation of "master and servant," as mutually helpful and beneficial in any household when conscientiously and considerately pursued. Neither home life nor business life can flourish without that wise inter-dependence which comes of such individual conditions, be our boast of equality what it may; and the true reconciling bond of all close relations of service is sympathy.

Hence comes it that we have, in our popular conception of employment under government, the idea of a service rendered to the public as to a master. We have no slaves here but we have servants. Magistracy, in the American sense, is never exercised as a despotism over the common mass, but rather is it an authority whose derivation is from the public itself, from the people. To quote Virginia's bill of rights of 1776: "All power is vested in and consequently derived from the people; magistrates are their trustees and servants and at all times amenable to them." And to the same intent, though in language somewhat amplified, is the Massachusetts declaration of 1780: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive or judicial, are their substitutes and agents, and

are at all times accountable to them." The vigorous expression of Virginia's instrument shows the first glow of experiment in republican self-government; while that of Massachusetts came at a calmer and less impulsive stage of revolution, when leaders meant to make authority emphatic. Not "citizen" but "subject" was the word used in this latter instrument to denote those over whom popular government was to be exercised. But the essential idea of both Virginia and Massachusetts maxims was here the same: the people themselves were the true source of authority; and to the people were all officers of the commonwealth to be held at all times accountable. Public officers were thus, under Virginia's definition, "trustees and servants"; by that of Massachusetts they were "substitutes and agents"; but whether called servants or agents, the meaning was identical. And so does the idea hold to the present day, as defined in all our later State instruments and as implied, at least, in our national one.

What we are, first of all, to observe of public servants or agents, as America views them, is that, though rulers in authority, their authority is derived fundamentally from the people, and that to the people, directly or indirectly, they are each and all ultimately accountable for their official acts. Subordinates, indeed, may be answerable to an immediate superior; but no one in authority, not even the supreme executive, may set himself above the mass of citizens as a whole, for their will in State or nation is and should be paramount and comprehensive.

Far different is such a theory from that upon which absolutism always rested in the old world. Yet let us bear in mind, the sway we recognize in a republic or democracy is that of the whole people collectively and not of individuals among them. In the ante-room of an executive building, during troublous times which I recall, men had gathered apart to obtain an audience of the chief magistrate, each eager upon his own affair. "What!" exclaimed one of them, impatient over his delay, "are they not our servants?" "Servants of all," was the response of the secretary, "but not of you or others here alone. You must wait for your turn."

Nor is public authority to be more lightly esteemed because it originates in popular sanction. Under any conditions magistracy can compel the submission of each and all inhabitants to its legitimate discretion. And in times of public peril and distress, the executive who guides and conserves, in the name and by authority of the people who have chosen him to supreme station, is mightiest of the mighty. Armies spring up, volunteers hasten to the front, fleets are organized and equipped, official energy for the public safety is not confined to the police alone. The laws themselves yield to necessity and suffer strain when arms resound.

The fathers of our political system insisted strongly that public service here should be freely open to all citizens alike, without distinction, and not confined to privileged classes or families. Says the Massachusetts instrument: "All qualified have an equal right to elect officers and to be elected for

public employments." And Virginia had already declared that offices should not be hereditary and that no man was entitled to exclusive emoluments or privileges. The two great banes of public office had been, under colonial experience, sinecures and that favored bestowal by relationship which we term nepotism; and against both of those evils all government has to contend.

Aside from pensions, civil or military, whose extent of allowance must be influenced by considerations of public advantage, the sinecure post which affords income to privileged incumbents without corresponding work must always be regarded with disfavor. No one should eat the bread of idleness at the involuntary cost of the public. Nepotism, too, is discouraged in this country. If, at the present day, our officials show personal favoritism in awarding the public patronage, they usually avoid the imputation of feathering nests for their own families; the near relation, if recognized at all, is shaded in some irresponsible post; and it is the needy follower, rather, the political friend and henchman, the party worker and the worker's own dependents, for whom places are found at the public crib, to the scandal and detriment of the service.

As against hereditary claim to office, American sentiment barred firmly the door at the outset and that bolt has never been withdrawn. Yet for ancestral service in some particular line of official duty our people are still susceptible of gratitude. Upon the bench, in the lesser civil offices, in the army or navy, American families have well sustained their name and fame, in many instances, through successive generations. And surely, under any stable

form of government, the illustrious career of a progenitor may strongly stimulate the scion of a later date to corresponding usefulness, though he, too, stands upon his own merits. Mayors of cities, governors of States, conquerors by sea or on the battlefield, have shown repeatedly to our democracy that ancestors will tell; and two native families have each furnished, at convenient intervals, two Presidents of the United States bearing the same surname.

Rotation was much insisted upon as an incident of official tenure, while our experiment of free government was new. "In order to prevent those who are vested with authority from becoming oppressors," is the strong language of the Massachusetts constitution, "the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life and to fill up vacant places by certain and regular elections and appointments." But here the highest posts were more strictly regarded, such as now-a-days all good citizens may compete for but only those honored at the ballot-box can obtain. To lay down such authority after exerting it well for a limited period is to win the crown of a people's applause and gratitude. To adjust, however, the proper terms and limitations of public office is a practical problem, and admits of variation. When the common concerns have grown to be vast and intricate, experience or expertness is a valuable accession to capacity in any official, and the servant of the people who has proved himself faithful and

honest in his place may well expect a fair continuance of employment, sufficient to justify self-devotion to his task, with, perhaps, in addition, the chance of promotion. And this holds particularly true of subordinates engaged in routine work. Fellow-citizens in the mass, under the strenuous conditions of our present age of living, give less heed than formerly, less scrutiny, to detailed operations of the government; they become absorbed in their private concerns, in the closer struggle to gain personal wealth, competence or a livelihood; and it is only the higher candidates and the more momentous issues of politics, that stimulate ambition or draw their concentrated gaze. To rotate for the mere sake of rotation, under such circumstances — to make frequent vacancies in the lesser offices only that other aspirants may take their turn — is to debauch and debase the practical conduct of affairs.

We see enough and more than enough of that ruthless sweep of the offices whenever a new party administration comes into power after some exciting canvass. If high executive incumbents must change frequently who are held directly answerable to the people — not to add that frequent change of representatives to which all legislative assemblies are liable — there should be something of a permanency in those lesser posts, at least, where the manifold details of public business are transacted and familiarity is almost indispensable. If you have a faithful and competent subordinate in your household or private business, you do not shuffle him off to give some new and untried applicant a chance; but rather you keep and, if you can, you promote him. Rotation, then, even in its most alluring sense of

giving the rewards of public station fairly and freely to all capable of filling such posts usefully, and not merely to pay off political debts, applies fairly enough with restrictions; and political elections, so costly and distracting as we find them to-day, ought not to come so frequently as to debar even the highest once placed in authority from fairly fulfilling the task which he has been chosen to accomplish. Free government, rightly comprehended and applied, is a blessing; but a rotation which keeps affairs in constant turmoil affords no government at all; it makes of public service a huge fountain trough at which each citizen may drink when his turn comes, and then go thirsty for the rest of his life.

The public servants who should essentially respond to the people and be held to actual account for their stewardship after a brief and stated term are those, then, of exalted public position, and notably those whose tenure is by election. They of subordinate station, on the other hand, respond rather to their own superiors, in accordance with custom in the private concerns of life. Tenure by faithfulness and efficiency might fairly be the rule for such subordinates under normal conditions; for both in the nation and our largest States the band of lesser employees has steadily increased until, in these days, swelled by local demand in the great centres of municipal life, the aggregate number of public servants throughout the Union has become enormous.

All submerged patronage of the lesser offices tends to wholesale abuse of party victories at the polls, and the pressure for spoils under a conquering chief's distribution becomes tremendous. Whether re-

garded in its effect upon the subordinate himself, whose appointment through influential pulls procures a position precarious and uncertain, at the cost of his own self-respect and personal independence; or upon the appointing head, who is beset with hungry applicants and solicitation, when he should be studying rather his graver tasks; or upon the legislature, whose members are taught to meddle and dictate in such matters; or upon citizens at large, whose prime interest, under any administration, is that of having a government of the people and for the people well carried on by its deputed agents — any such system of favoritism in awarding the lesser offices is vicious and corrupting. Government thus becomes the stronghold of usurping and plundering partisans. Jobbery flourishes and the dickering of patronage; public servants in high authority grow into public masters; and political parties come to cohere less because of useful measures they advocate than through the coalition of selfish and sinister interests at the cost of the tax-payers.

On the one hand, within the last forty years, the array of national, State and civic offices has vastly increased, but happily on the other, the cause of civil service reform has made such genuine progress as now to cover in a large and increasing proportion of the lesser salaried positions, under regulations which check or forbid their capricious distribution and ensure something of stability to such as prove themselves honest, capable and industrious at their posts. Patronage by favor must and will exist to some extent under any form of government; and

under our own the national appointing head cannot be constitutionally coerced beyond a certain point; but the evils of such patronage have been greatly reduced under a standing system of executive rules, cheerfully promulgated, which public opinion has come to sustain. In Great Britain, a reform of this kind prevailed and spread, beginning with the post-office, although at first encountering the most violent prejudice; and similar experiments succeeded in France and Germany. In America, somewhat later, the cause made its first real advance under an Act of Congress passed in 1871. Civil service rules and civil service boards for framing and applying those rules are at this day a notable feature of State and municipal as well as of Federal administration, and the result has been to make the public service more attractive and more freely open to the young and efficient of our people at large than ever before. To a Democratic President and the only one of that party faith who has ruled since 1861, we owe the most liberal extension of rules in that respect that the nation has yet known; a change certainly, since Whigs and Democrats fought half a century earlier. Yet only a trained public opinion, honest and intelligent of purpose, can permanently keep down party passion in such respect or check the selfish perversity of human nature.

Probation is a desirable element in all just schemes of appointment to the lesser places. Once fully installed, the civil service employee needs for his best effort the stimulus of an assurance that the reward of promotion, or at least of reasonable continuance, is within reach; and to any aspirant in life who has once gained a vocation, permanence

therein and the dignity of the employment furnish a fair offset to modest compensation. We lose many valuable young men who enter the public service for immediate need, because such permanent attractions are wanting. But a clerical appointment may well at the outset be probationary for six months or a year; at the end of which time a reappointment should make the selection full and final. Apart from all civil service rules, some high officials at Washington in the past have pursued such a practice with profit to themselves and the public. The State department has always maintained an esprit de corps, its successive Secretaries showing much conservatism in making changes. During our Civil War, when its routine force had to be largely increased, the new clerks appointed were placed at first upon a distinctly temporary footing, and only transferred to the permanent roll as vacancies occurred after each had proved his fitness for advancement.

The late Sir Arthur Helps, in his writings on British political science, expressed much favor towards subordinate boards or commissions for transacting administrative business. But any such establishment, I think, has disadvantages. Where judicial or legislative functions of a sort are to be exercised — as in deciding controversies upon close investigations of fact, or in promulgating rules deliberately framed — a board or commission may be of good avail; but for the prompt and efficient despatch of routine business, where leading principles are clear and facts readily ascertained, a single head

seems far better; and to superior consistency in working out details is thus added a superior incentive to success, with a superior sense of responsibility. Then, too, the single-head system proves usually an economy, and not in salaries alone. For a commission or directory is apt to procrastinate, to be prodigal in its plans, to move with unwieldiness; and even boards whose members serve without pay rely much upon a salaried secretary who manages details for them. In Massachusetts, which carries perhaps the heaviest public debt proportionally of any State in the Union, boards, with rotating members whose terms expire at different dates, absorb the various functions of administration so largely — wheels propelling wheels, — that the governor, who is chosen annually, exerts but little executive power beyond filling vacancies as they occur. Some of these boards are composed of citizens who serve without pay, and their very disinterestedness makes them all the more zealous that the work which engages them, — charitable, educational or beautifying, — shall widen its costly range. It was a wise University President who once remarked that the function of his earnest and efficient professors in the faculty was to press for the development each of his own department as the essential one, while his function was to restrain them all.

The ultimate criterion of successful self-rule is found in the local unit or monad of town or city. There democracy learns its primary lessons, and there, too, it wages its hardest fight; and if corruption and misrule gain there finally the upper hand,

government by the people must perish. In our rural American settlements, where agriculture makes the basis of prosperity, and a homogeneous society, largely composed of intelligent farmers and freeholders — neighbors all and easy acquaintances, — vote, discuss and determine in public meeting together, self-rule is safe enough. But with our modern manufactures inducing a promiscuous mill population, — with our gigantic commerce and immigration from abroad, a home market and local transportation, — swarm the vast and medley crowds of inhabitants, native and foreign-born, rich and poor, taxable and non-taxable, by tens and hundreds of thousands, in some ill-assorted metropolis; and there, with luxury and poverty, crime and pauperism, brought closely together, the whole problem of local regulation becomes increasingly a complex and difficult one. Service of the people is truly in a hard case where office-holding, instead of bringing social renown and pre-eminence, is thought hardly respectable.

We have erred as a people, I think, in treating the government of cities and great centres of population too much like that of a commonwealth. Neither the area of territory covered, nor the theory of corporation law, nor the character of the concerns combined in interest, justify here, as in a state or nation, the fundamental separation of governing powers or assemblies minutely representative. Such methods worked tolerably, to be sure, while citizens the best and fittest served willingly and were invited to serve; but no longer. The two-chambered assembly of aldermen and common council is no fit substitute for a town meeting; and I know of one New England

town, far more populous than many a city, which has steadily refused municipal merger or a municipal charter, because still persuaded that the town system simplifies the machinery of its government, compels the open accountability of those chosen to administer and preserves best the spirit of democracy. For reward that town is a favorite domicile with rich men in preference to the neighboring cities; and its rate of taxation has been well kept down.

Just at this time, in various States, interesting schemes are proposed for municipal government which, while eliminating the town-meeting or plebiscite, may yet simplify political conditions. A city is at law a chartered government, similar in its establishment to private or business corporations, and liable, under constituent provisions, to modifying enactments from time to time. All corporations, indeed, whether public or private, are but the creatures of legislation in their origin. Washington city, or rather the District of Columbia, maintains an exceptional existence; it is the sole metropolis of the Union, the only central abode of the nation; and Congress, under our Federal constitution, controls there exclusively. Washington was long governed by its own inhabitants under a city charter; but a full territorial status was given to the district during the presidency of General Grant, — with governor, secretary and a legislature, and with a delegate, besides, to sit in the popular branch of Congress. A few years' trial however brought that municipal monstrosity to the verge of utter bankruptcy; whereupon Congress, sweeping away the territorial establishment, and assuming the aggregate debt with a definite adjustment of taxation for the

future, placed the whole jurisdiction in charge of commissioners to be appointed by the President. Since then, favored by many circumstances, Washington has blossomed and bloomed, without local suffrage or self-rule at all; yet its conditions are too peculiar to serve for example elsewhere. We learn thus, however, that a large city may be administered by a board of three men, well-selected; and we learn besides, that any American city with a full territorial outfit is over-weighted. Experiments more to the purpose in simplified city government were lately made with success in Galveston and Houston, southern cities of moderate size; while Iowa has since initiated in full detail a general plan, for its cities of 25,000 inhabitants or more to adopt at discretion, and with special reference to Des Moines, where the scheme will soon be practically tested.

The main feature of the civic plans thus instituted is to vest direct municipal control in a board of directors. In Galveston, three persons — much like the familiar selectmen of New England towns — administer all local concerns, dividing the departments among themselves; while by the Des Moines plan a mayor and four councillors are to take similar charge. Responsibility is closely fixed by such a method, and the popular gaze centres upon a few fellow-citizens deputed at the polls to administer wholly.¹ Another plan which some propose differs a little from both these Texas and Iowa plans, and conforms more closely, I am told, to city schemes successfully working in Great Britain. Here a

¹ The legislature of Massachusetts (1908) has just applied to Chelsea, in that State, an experimental scheme of government by commission, under the inducement of a disastrous fire compelling the re-building of the city.

municipal council, say of fifteen members, all chosen by the people for three years, with one-third rotating each year, conducts all civic operations as a body of convenient size; the mayor or chief executive being chosen from their number like the president of a business corporation. Since commissioners, by each and all of these plans, are chosen at large by the voters, local self-rule as a principle suffers no violation.¹

In schemes of municipal government, such as these, the main direction of civic affairs blends executive and legislative functions; and, aside from dispensing justice in courts civil and criminal, city government is administered by a convenient sized board of directors, as in corporations generally. But among charters which respect more our older traditions, that lately framed for Baltimore, which has been a few years in operation, receives much praise. Among its noteworthy features are: civic elections from among civic leaders of the whole people, regardless of subdivision by ward lines; a concentration of power in the mayor, such as to promote good rule and a personal sense of accountability to the voters; the requirement of professional skill in all professional offices; a positive pre-arrangement for public recompense in every grant of public franchises; and a clear separation of the functions of estimate or appropriation from that of expenditure. So inherent and so vital to the public interest must be all power of granting and defining the amounts to be publicly expended, that many reformers still insist upon some sort of municipal assembly or council for that

¹ The new Chelsea government modifies this principle somewhat, to meet an emergency.

purpose, as the only legitimate creators of debt for a large city. But, however it may be, where town meetings of all the voters give competent authority, or, by way of substitute, in a city, the referendum and initiative prevail on the general behalf, I believe that purely representative assemblies for a city should be discouraged, and that State legislatures, rather, and State constitutions should impose judicious limits upon local borrowing or appropriation. For with civic populations as we find them distributed, the average representation by ward or precinct must largely consist of untrustworthy men, interested in petty jobs and in deals for power and patronage. Few comparatively of such persons have a tax-paying interest in appropriations or debt. They largely represent in ordinary times the vicious aims of metropolitan life rather than its virtuous. Elevate the character of that representation, if you may, on emergency, and even then such an assembly proves inefficient and obstructive; and the more so when it consists of two branches. A small board of president and directors administer skillfully a great railway or industrial enterprise with enormous money dealings; and why not here a mayor and a few capable aldermen?

It is true that the spirit of reform in all free government should be aroused among the people themselves; that unless the electors are virtuous and intelligent and bent upon getting good rule, the city will not have it; that it is not enough to set a new establishment upon its feet, but each step in the new progression must be watched and guided. Yet the scheme itself of any reforming experiment is of the utmost consequence towards ensuring success,

and the simpler and more sensible the plan the easier will be found its operation. Where arbitrary district lines are fairly obliterated, and the voter has only to exalt a few fellow-citizens of the whole civic jurisdiction to conspicuous authority, he is more likely to vote zealously, discreetly and regularly, than where he must choose among many obscure nominees for powers subdivided. The greater, too, the chance of honorable distinction, the better are the candidates available.

It may, perhaps, be claimed that where the prizes of municipal authority are few and involve an individual power and patronage vast and discretionary, unscrupulous bosses will contrive a machine all the more cunningly to capture them. But to this we reply that grafters cannot be easily combined for a formidable machine where local cohesion is discouraged. Government is a practical affair under all circumstances; and a plan might be radically changed to suit one city which should stand unaltered or only slightly modified for another. If under the most favoring general conditions the honest and intelligent of a community cannot or will not break down and keep down corrupt combination against the general interests, that community is unfit for self-rule and must bear the ill consequences.

There is one more problem in connection with public service which I wish to touch upon: and that is, how far ought a government like ours to reach out and take concerns into its own management which have been carried on hitherto by private capital and enterprise. The American idea of sovereignty

has been hitherto a simple one: to afford to every one the freest possible opportunity to make a living, by protecting and upholding all individual rights; but not so as to absorb business and hire employment in the name of the people, nor for undertaking industries whose range extends much beyond the legitimate needs of administration. Towns, cities or counties open and maintain highways, supply institutions penal and philanthropic, provide schools, keep up a police, control sanitary conditions. States direct, on a larger scale, with the same general object viewed in a broader range, and heedful of the whole commonwealth. The United States, under a constitution of its own, has a national jurisdiction, under delegated powers specifically expressed: it deals with governments abroad, regulates foreign and interstate commerce, insures domestic tranquillity and harmonizes the operations of the States themselves. Each of the three species of authority thus co-ordinated has its proper bounds.

On the theory of public need or advantage in addition to private convenience, or as concerns the profit to accrue from its private customers, there is more reason why a town or city should own its water supply than its gas or electric lighting; and more reason why it should own its lighting system than the carriage of passengers by horse, steam or electric power, even though its highways be thus used. It is a serious undertaking for any town or city to carry on a business with its own separate inhabitants, and to do so profitably in a money sense may prove extremely difficult. What private capital, with its ambition to earn a profit, may successfully conduct by its freer methods, the public,

managing through public agents alone, will often find costly and burdensome, instead of profitable.

Among such utilities of local concern, a water supply is by far the most suitable for a town or city to undertake. It is the nearest allied to our recognized public functions; it is the most universally in demand among inhabitants; it is the easiest managed and the easiest comprehended of all such enterprises; its proper conduct promotes the public health and cleanliness and assures protection against disastrous fires. But with lighting as a public undertaking the case is not so strong; for here gas and electricity are rivals at this day for the general patronage, while many people dispense with them both, using oil or candles; large and costly plants well equipped are needful and expert study must keep constantly on the stretch — with electricity in particular — to make new inventions available, new improvements, new economies. All that government needs here for itself is to light its streets and its public buildings.

As for that other and vaster problem which attracts so much attention at this day — the carriage of passengers as a public pursuit — the business itself is so wholly remote from the essential operations of local rule as never to have gained a lodgment in the public mind until, in quite recent years, street railways came into vogue and the laying of tracks in the public highways compelled a grant of privileges. It is vain to suppose that, while our petty politics lands lazy, shiftless and ignorant men in the lesser jobs of municipal control — to say nothing of vicious self-seekers — that a competent force of trained employees, zealous and worthy of promotion, can be

well kept in regular service for operations so difficult, so foreign to civic government and so expensive. Nor is it in human nature to expect that subordinates can be so well disciplined and kept up to the standard in operations whose interest is diffused through the community, as in those of private concern, where one's own funds are invested for industrial loss or gain. Then, as to customers, the average citizen is moved by the wish of being carried for a cent or two less in his fares, no matter by what general sacrifice that result is brought about, and the responsible public servant who seeks popularity will dismiss economies to favor him. But with private owners the whole scope of the business is considered that the enterprise may succeed pecuniarily, and any stockholder knows that his potential dividend is subject to fixed charges which must be met before a net profit can accrue. Wherever individual risks must be taken the balance-sheet will be scrutinized and remedies applied intelligently; but in business borne by the whole people one is rarely intent upon more than what he himself has to pay in taxes. For our great majority, like customers in a department store, seek the lowest price as patrons for what they want and care not for a seller's sacrifice.

Another obstacle to the local conduct of such undertakings is the constant widening of their scope beyond the needs or appropriate control of a single community. With better gains and savings, where the business is broadly conducted, we now find gas and electric plants united under a single management so as to serve several towns and cities; while even for a water supply municipalities must frequently combine. Both gas and electricity, too, are

sought for other purposes than mere lighting—as for heating or motive power. Street railway systems come to stretch farther and farther beyond the town or city in which their traction originated, until rivalling in fact those older transportation lines by steam which formerly absorbed the traffic in freight and passengers between points distant. All this opens up complexities too great for solution by a single local government, and legislation by the State must be invoked to reconcile and control.

In its most portentous aspect this whole problem of public management or monopolization is becoming vastly more than a municipal or even a state concern; and in railway transportation, at least, its range extends to inter-state control, and is growing to be a great national issue. If it be argued that the interests of our whole people would be better served and promoted by having any or all of the vast and growing transportation systems of this Union placed in the centralized grasp of Congress and the authorities at Washington, let us ask for a moment how has it been with the one great carrier establishment already in the national keeping—that of the post office. Here is a transportation of the simplest kind, which comes home to every one and is easily regulated by fixed and uniform rates; a business long conducted by government in civilized countries and wisely placed in America upon a united footing, while yet we were crown colonies. All the practice, all the experience, inherited through centuries of dependence or independence from an unbroken line of public managers, beginning with the great Frank-

lin, as a loyal subject of King George, have been ours. The actual appropriateness of such a public establishment has never been seriously doubted, and our constitution makes the right of the general government to own and conduct it clear, positive and unqualified. As a matter of fact, however, — to be verified by comparative figures and the statistics of our private express companies engaged in a similar pursuit and making great profit, — it will be found, I think, that this government of ours does not get a fair equivalent for the money it annually expends. I will not say that our postal servants, as a whole, are incompetent or untrustworthy, for the business itself is easy and under requirement of the merit system this branch of civil employment has vastly improved of late years; yet the time is not remote in the past when local postmasters were largely political placemen and party workers, nor has bureau corruption at Washington been unknown. For honor and enterprise at a given date much will depend upon the high cabinet officer who happens to be in charge for a brief time as administrations rotate; and extensions of the service, hither and thither, are due most of all to the push and energy of our private citizens, who build and equip new highways of commerce with their own capital and whose officials make mail contracts with government for a mutual advantage. What I wish to remark, however, is that under the fitful supervision of our overworked Congress laws get rusty, abuses creep stealthily into the system, and favoritism or the desire of popularity dictates changes at variance with a just, uniform or profitable management. Thus, the franking privilege among Congressmen has been

at times a flagrant scandal; this very day the mails are overloaded with matter transported at losing rates in order that the publishers of newspapers and periodicals, those potent moulders of voting opinion, may be pleased; and latest of all, we have for rural and remote communities a free delivery system, plainly unremunerative, which legislators who wish local popularity seek to extend indefinitely, to the depletion of the treasury. In short, our postoffice establishment, with all its positive merits, has long since ceased even the effort to be self-supporting, and foots up annually for our Union a considerable deficit, instead. It seeks to become, rather than an aid to the revenue, a benevolence, a charity; and like most charities managed by public servants at their discretion, its bounty is dispensed with something of partiality — to say no more — as against the general interest.

How, then, as to launching this Union upon the far more involved and prodigious task of owning and conducting the railroads — whether in connection with State ownership for State carriage or as the great centralized transporter in the land? The very thought is staggering, when we reckon the mileage, the army of employees requisite or the many billions of dollars to be added to our public debt. European governments of moderate area and dense population may, with each an exclusive and compact jurisdiction, manage railroads as public establishments; but we already have in the United States considerably more miles of railway track than all Europe comprises. It is even less, perhaps, the despotism sure to result from so powerful a lever of centralized patronage which should alarm us than the likelihood that so

vast a consolidation would merge into a grand socialistic scheme for national bounty, leaving all profit-seeking behind. People would wish to travel free or at rates ruinous; citizens by the million would seek easy employ; and, worse than all this, individuals, corporations, towns and cities themselves, would be forced to lobby at Washington in eager competition for special transportation favors that might promote a special advantage. So far from increasing net earnings we should sink the nation speedily in a bottomless pit of pecuniary waste and jobbery.

Another consideration against government ownership which ought to be taken into account, is the legal non-accountability of government to citizens. Every carrier, from railroad to teamster, is bound by our common law to serve the public alike in his vocation; and, furthermore he becomes a virtual insurer of the goods transported against all loss or injury, except for a few specified calamities which he would be powerless to provide against. Legal redress for breach of such conditions is ample and our legislation enhances the remedy. Again, if a passenger suffers in life or limb through even the slight fault of a carrier or his servants, there is full recourse in damages. Now, if government, on the other hand, be the carrier in any such case, whether State or nation, there is no remedy by suit, save so far as a sovereign may consent by positive statute to be held liable to a subject. Hence, if government takes the railways into its control and ownership, there can be no implied redress against its favoritism or partiality; no fine can be imposed for rebates, no injunction issued; while, as for loss or injury suf-

ferred in person or property, Congress or the legislature must deliberately choose whether to economize in expense by withholding indemnity or open up by enactment a multiplicity of vexatious suits by customers such as all carrier companies have found inseparable from the business. If a private express company fails even now to deliver a letter or a light parcel entrusted to its care, it must as a rule reimburse fully the customer; but government in postoffice transactions long stood upon its sovereign immunity in such respects; and only very lately has Congress allowed to registered losers in the mail a statute recompense to the limit of ten dollars, by claim made upon the Postmaster General.

In short, regulation, and regulation alone, is the true recourse for government, in dealing with most public utilities, and especially with utilities which lie outside of government needs and whose conduct demands great skill, expertness and industry, in order to earn a profit. If courts lack adequate powers in such respect, public opinion will induce legislation to supply the need. It is thus, most of all, that private corporations engaged in any business essential to the whole community may be forced to give equal facilities to all who are prepared to pay fair and customary rates. As to fixing the rates themselves, — which certainly should not be after so arbitrary and meddlesome a manner as to do violence to private ownership or deny to invested capital its fair return, — I have my doubts of the utility of any political commission as active rate-makers at their discretion. They may investigate

and make findings upon special cases, but after all, what may or may not be a "just and reasonable" rate is for courts to settle upon a controversy; nor ought owners to be deprived of their property rights to please the multitude. To "regulate" is quite consistent with the functions of government — to subject to some prescribed course of dealing — to adjust by salutary rule or method. This is not however, to actively manage in detail or to conduct the business; for this belongs to responsible owners or, in an emergency, to officers of the court acting in the interest of both creditors and owners and under direct judicial supervision. And regulation by government applies most legitimately to a permitted monopoly, since free competition in a business is of itself a regulator.

And thus, in the language of our Federal constitution, has Congress express power to "regulate" commerce among the several States, but not to own, manage, or carry it on responsibly; that same word "regulate" applying likewise to our commerce with foreign nations and upon the high seas, as we have constantly respected the sense of such a term. This Union does not own the shipping; why, then, should it own the railways? All public regulation rightly regards the rights of private property. And government through public servants will thus, and thus only, fulfil its exalted mission; which is to grow and gather strength and give support, not fitfully nor with premature decay, but so as to "take root downward and bear fruit upward."

CHAPTER XII

THE STRIFE TO SURPASS

I CHANCED to read, some months ago, in one of the weekly newspapers of Philadelphia, a letter from a colored citizen of sobriety, which protested against the charge so often made that those of his race were seeking social equality with the whites. "It is not social equality," he contends, "that my brethren cherish, but the ambition of being superior to others in something — as in wealth, display, luxury or athletics."

That observation is a suggestive one and may set others among us thinking, besides those of the race referred to. Personal liberty, — the opportunity to rise in life and gain influence and standing in the community, — does not primarily or immediately set one to equalizing his condition with that of any other men or set of men socially superior, so much as it makes him intent upon getting above his present situation and in some way surpassing those who most closely surround him. He may, it is true, emulate exemplars, cherish ideals, hope for affiliation hereafter in the broader plane to which he aspires, but his main thought is, in one direction or another, to distinguish himself among his fellows. It is not so greatly to be equal to his superiors that he covets, but to be superior to his equals. Even if motives be so blended in one's practical conduct of

life as hardly to operate independently, each impulse is distinguishable.

That ambitious, self-expanding spirit which swells within the breast of each inhabitant whose favored lot is cast among free institutions like ours, aggregates individuals of character in one vast community. The millions and tens of millions to which our population foots up rapidly by count, upon successive census rolls, are not mere totals, but many a unit glows with distinct and earnest life. We are not like sands upon the seashore, conglomerate, innumerable, but rather like sparks which course to and fro, each endowed with the essence of vitality, and all immensely effective together in action, because effective separately.

Something of the overpowering force which comes from intelligent and positive habits of expression, where individual minds and wills are strongly united in instant action, has been witnessed at various great crises of our national life and may be witnessed again at some other great crisis hereafter. And that same creative and co-operative energy — that same combination of forceful personal wills — has worked steadily, at every step of our advance to wealth and refinement, in opening up the abundant resources of a continent. The negro race among us, though lingering still of choice among the scenes and surroundings where a barbaric career once compelled, is stirred by this stimulating atmosphere of ours to a higher and bolder life. And while, too, the oppressed European exile who has sought here an asylum may bear on his back the heavy burden of ignorance and iniquity while trying to better his fortunes, he becomes speedily sensible of a progress

in personal self-respect and freedom. What the elder among such undeveloped inhabitants, hardened in cramped modes of life under some older system, may fail of achieving in the individual effort to rise, his children, reared and trained from infancy under republican conditions, carry into fair accomplishment. Education, secular and religious, among the rising generation of our composite population — the training of each and all for the duties of citizenship and an honest and useful livelihood — upon this does the salvation of our institutions and society most of all depend from age to age.

The desire for social equality and the desire to surpass — these then are the two great forces which impel our individual life here at the present day in eager progress. These forces are not easily reconciled; and yet upon their just correlation or resultant, well maintained, depends essentially the ultimate success and preservation of our national experiment. And what much enhances the difficulty of the problem, at this later day, is the undeniable fact that, while the Anglo-Saxon element of our society still remains predominant, the blending of bloods in our increasing population, even among those alone of the white Caucasian type, is incessant and irresistible, so that amalgamation, among races at least of the same complexion, appears the final outcome of our political problem.

Some have held that the ideas of equality for which our American ancestors contended were only those of equality before the law — equal civil rights, — and that of all men, the British-born has ever

been strongly reluctant to concede anything like a social equality. But this is exaggeration. It is rather in his strong individuality, in his sturdy personal regard for the independent rights of himself and his household, that the Anglo-Saxon has figured historically, in contrast with the more sympathetic, submissive or emotional types of continental Europe. The Englishman disdains others or remains indifferent to them until a better acquaintance and intercourse has compelled his respect; but he is not impervious to impressions. And he has, withal, a conscience and a profound sense of justice.

Here, in this newly peopled continent of ours, where nature had to be reclaimed from primeval wildness, Englishmen of the great middle class settled together, leaving the old home behind. Their simple association as neighbors, exposed to common dangers, without a local ancestry or hereditary privilege of rank, and holding similar views in politics and religion — all tended to establish them social as well as civil equals. Sectarian affiliation in sets apart, the diverse opportunities for study or training, differences of employment, might of course preserve in a measure those class distinctions to which they had been trained in Europe; and yet the whole tendency of our institutions as royalty loosened its hold, was to a social equality more real and comprehensive than the old world had ever known. Titles of nobility never here took root. Scarcely any one at the outset of his career was rich enough to live in indolence or idleness; almost all married young and worked steadily to maintain home and family; while even in our most prosperous centres

of trade, commerce and the professions, anything like a leisure class, such as London or Paris had bred, was unknown. Class differences, such as existed at all, were of the lesser kind; as between the college-bred who practised a profession and those brought up to business; as between traders, wholesale or retail, and mechanics or simple laborers; and for all of superior talent, though humbly-born, the way was fairly open to rise in life through worth and force of character. What Dr. Holmes used to call our "blue-blood" families were merely those whose males had been educated at college through two or three generations in succession.

Any community of small farmers — of freeholders who apply head and hand to the moderate means of living, and who rear children, each on the paternal acres, — are sure to approach a social level in their common and congenial interests. They thus approached, most of all, in the northern towns and counties of our New England and middle colonies, while yet we lived under the King; and, ever since, under the stronger cement of free institutions, State and national, that widening sense of brotherhood has spread westward over this continent from the Alleghanies to the Mississippi; from the Mississippi to the Rocky mountains, and far beyond that distant barrier, adown the fertile slope remotely bounded by the Pacific seas. If society among our southern colonies and States was built up somewhat differently and with more squirarchal distinction, yet the same affinities prevailed, and among the planters or ruling set, at least, as among the poor whites, besides, a parallel social equality developed after its own peculiar pattern. Of exclusive class assumption

with an exclusive nobility which imposes special obligation, we have known comparatively nothing.

I speak, to be sure, of tendencies and not of well-rounded results. Social life everywhere has its inequalities, and were all human brotherhood upon a dead level of commonplace, living would be as tame and uninteresting as prairie scenery. While the world lasts we are likely to find the prosperous and the unprosperous apart in intimacy, the zealous and the shiftless, the cultured and the ignorant, the refined and the vulgar, the upright and the vicious, the wealthy and the wretched, the striving and the hopelessly stranded. Condescension may be gracious, but it is condescension still. Conventional good society will not surrender its keys nor throw wide open its portals to the promiscuous multitude. There is a certain exclusiveness in all good fellowship, while home demands a sacred privacy. Against the flood of newcomers, the old régime puts up its barriers, while in the village which has expanded into a city the earliest dwellers and their descendants, now opulent, assert the preferential claim of first families. Times and localities change in their surroundings, and the larger and more incongruous the mass of inhabitants, as years roll on, the more do social elements gather into groups.

Yet, after all, we in our favored country have gone far towards solving the universal problem of neighborliness and good will, consistently with those habits of congenial association to which mankind must ever be susceptible. Nor have we ever had a ruling class, in the whole area of our society, higher

in rank than that which England designates as commoners and France as the bourgeoisie. Such variations, then, as we find are only gradations among those of middle rank, and merit or well-disbursed wealth finds readily a recognition. Serfdom does not now exist at all, nor had it ever a positive status here except as applied to the negro race. And that lowest class of free inhabitants in all lands — unskilled manual toilers who depend in ignorance upon casual employment — has never remained long with us inert and stagnant. Pauperism and crime have been but passing elements in our midst. We know no peasant class, in the European sense of the word; our native mechanics and workmen are intelligent and rise readily in life; nor has the increasing demand for unskilled workers been latterly met, except from the humblest European alien element on the one shore, or Asiatic on the other, which comes and goes as the market demands. American society, in short, has fluidity, tends constantly to equalize, assimilating for the general good whatever element proves permanently useful to society, and refusing to solidify into caste or fixed conditions, or, on the other hand, to accept the avowed enemies of all society

But the second grand impulse of our democracy is to incite each one to surpass, to improve original conditions and surroundings, to outstrip immediate equals and fellows in some particular, through the ambition of rising. And this we see operating in every line of achievement which invites a rivalry, though within the social limits which I have de-



scribed. The poor farmer's son leaves rural surroundings and seeks the city to push and jostle his way to a mercantile renown. The humble orphan, against all disadvantage of birth and early environ, gains an education which may fit for professional life and win high distinction. One miserably born gains the highest official station in the gift of the people and proves his fitness for the promotion. Though aspirants be many, yet each avenue is open for such as would enter the race. In every walk of life, — political, industrial or professional, — we readily find leaders who have risen from the lowest to the highest in influence, and whose exaltation has been due to self-help, to superior energy and strength in laying hold of the opportunities afforded by the civilizing of a continent. Even in athletics or games of mental skill, one tries to break the record of past victories.

Our whole social atmosphere stimulates to the betterment of individual life and its conditions. We may falter, we may fall; but soon we rise again and our flight knows no perch save that to which mortality limits us. And herein is felt that incentive to surpass which makes of each true American more than a mere subject or citizen, born to a fixed condition in life which he must always occupy, with his forbears before him and his progeny in time to come.

Where the great mass of a truly republican society is ambitious and progressive, each one seeking to better himself and to become superior to his surroundings, it must needs follow that much of this ambition and progressiveness will be confined to a narrow range of attainment, and to what proves

after all but a sort of common-place excellence. One gains thus an increased comfort of living and better material surroundings — a finer house, costlier furniture and equipage, more style in dress, more show in society, a larger participation in the luxuries of life. And hence, as money brings such enhancement, most of all, the pursuit of wealth, riches or a competence, has been the most notable phase of ambition among average Americans. While we were yet young as an independent people and our daily life as a whole was still somewhat plodding and prosaic — or during the first half century of a national existence — strangers from Europe were impressed by the ant-like push and industry which marked everywhere our earnest pursuit of business, as though to live at all meant mostly to acquire and accumulate. To them it seemed as though gayety and pleasure were foreign to us and that the grand symbol of our aspiration was the mighty dollar. And this because home, family and the domestic life engaged the common interest, and to increase home and household comforts and the standard of a simple style and respectability was the universal aim. Expenditure might be seen in the highest circle, but culture and refinement made little display and few could afford to live lazily. Privation and loneliness wrought out their work in reclaiming the forest lands and wilderness; and everywhere was strenuous progress. Aggregate gains came from individual improvement. No great contrasts appeared, in our vast north and northwest, between the dwellings of lofty and lowly, the rich and the poor, such as foreign countries are familiar with. Hovels of misery were few, while castles and palaces were un-

known; even log cabins were the abode of self-respect. Beyond all comparison with Europe, the homes of our teeming millions were tasteful and comfortably supplied. Our pride was not in the picturesque inequalities of life but in the high level of our mediocrity.

All such American aspects have changed much in course of the last sixty years, and while we have broadened and beautified as a nation in many respects, equal social relations and the struggle for superiority by no means harmonize so nearly or square so closely with republican standards as in our earlier era. A luxurious and leisure class, having a disproportionate share of wealth, develops on the one hand, with a wretchedly poor and dependent one on the other; great heights and great depressions succeed in historical landscape the former smooth level. And prime among the factors inducing such a change we may reckon the immense growth of corporate establishments of great aggregate capital, which a favored few may control, in place of our former individual industries with distributed wealth.

While men formerly pursued their vocation in life singly or in partnerships, one's whole capital of intelligence, industry and pecuniary means was his own, and in whatever enterprise he might embark, his whole fortune, his whole credit was at stake. If he succeeded, the success redounded to his happiness; if he failed he lost all. With a responsibility so momentous went a strong sense of personal honor and personal standing; eagerness of pursuit was

tempered by a heedful conservatism. Competition too was open, for none could command great capital. But the nineteenth century proved epochal in the world's progress — for invention, for the triumphs of natural science, for the grand exploiting of the world's resources upon or below the surface. Steam as a motive power by land or sea did miracles of might; huge mills for manufacturing were organized; railways and steamboat lines increased our inland traffic enormously; and to the accessories of life were added such novelties as gas, the telegraph and telephone, and latest of all, electric light, heating and motive power. To develop and apply such new industries with many lesser ones, — and to open up the arteries of commerce, bridge wide rivers, work great mines of gold, silver, iron, coal, copper and other minerals, — large aggregations of capital became indispensable, such as individual and partnership combinations were inadequate to supply. Hence grew rapidly the corporation method of business enterprise, which combines great wealth in fractional shares freely transferable, affording the maximum of organized direction with the minimum of personal responsibility for the enterprise itself. But monopolies, once exceptionally granted by the legislative charter of a single State, have become widespread, expansive, interstate of operation, with States competing in the very grant of charter facilities — almost universally applied to the great business concerns of life; until to-day their amalgamation and absorption, in a growing strife to control gigantic industries and crowd out competition altogether, make a spectacle at which theoretical democracy stands bewildered.

It is difficult to surmise what will be the final outcome of such monopolizing conditions; amazingly difficult to devise any practical means of stifling or extinguishing what many regard as a natural and inevitable outcome of our highly organized industrial life. It certainly seems impossible that we should ever return to former simplicity of methods or restore competition so that individual contestants or small aggregations of capital shall hold the field once more.

The corporation has been of immense advantage to society in enabling great material projects to be successfully carried out. But it has brought prodigious evils in its train, and one of those evils is the diminishing sense among business men of personal honor, personal responsibility, personal integrity. We hear much in these days of "good corporations" and "bad corporations"; but this is a misnomer. All corporations are but legislative creatures; they are soulless and without morals, good or bad. Such an establishment is no more created presumably for fraud, wrongdoing or the achievement of pernicious ends, than a city or the legislature itself. Its real element for good or evil lies in the character of the individuals who work it, who possess control and give it direction. And since stockholders, and even the investors in its debt may be a legion, scattered everywhere and with holdings large or small, it follows that great money penalties imposed upon a corporation, or the ruthless destruction of its business, is largely an infliction upon a host of guiltless investors unable to control absolutely and directly; among whom may be persons dependent upon moderate incomes, churches and charitable societies,

widows, orphans and beneficiaries of small means, as worthy of protection as depositors in a savings bank. Nor should government show partiality, when some abuse is to be disciplined, by pursuing one corporation so as to do it all the damage possible, while others equally offending go clear and gain in the stock market.

It is the directorate, the management, of any corporation, upon which public scrutiny should be focussed, for the men in power and they alone stamp by their official conduct the impression of good or bad. States should coöperate better in granting licenses to organize; and public regulation should, most of all, seek to curb promoters and managers in the misuse of opportunities, and, in the interest of stockholders, even more than of the public, compel them to honesty and prudence. Fraudulent devices to make dupes of investors; inner deals and bargains conducted for the secret and undue profit of directors at the cost of their fiduciaries; extravagant salaries and perquisites voted by managers to themselves and sinister contracts whereby they play from one hand into another against the common interest — all such abuses, so common now-a-days, should be rigorously dealt with at the law and each faithless representative himself should be compelled to disgorge and surrender. It is at such points that correction should direct its better energies, and not so as to further impoverish stockholders in the mass, who earnestly wish uprightness but cannot easily combine to make purgation. Pursue the faithless, the fraudulent, the self-aggrandizing among such directors as individuals; impose upon them the harshest penalties of the law and let them feel

that the public reprobates their misconduct. Such men are socially proud and presuming; and if our criminal laws visited oftener with imprisonment high financiering such as we call stealing and robbery where the offence and offender are humble, our ethical atmosphere would be purer.

It is not only that an individual sense of business credit and responsibility fails in these times, but that even fiduciary regard is often wanting such as ought to induce prudence and honest conduct in managing the common interests committed to one's charge. Any trustee or executor under a will is held fairly accountable in our probate courts, but corporate supervision by or on behalf of stockholders appears sadly deficient as these organisms of commerce expand and combine; and hence the many abuses of authority. The corporate magnate grows autocratic; he displaces subordinates who will not subserve his ends, and employs facile minions. He causes false entries in the books, false statements, false accounts. He employs astute lawyers in the interest of fraud and chicanery. He seeks by bribery and corruption to gain his ends with legislatures and public servants.

And thus do we find the gulf yawning wider and wider between the rich and the poor of the land — between the few who seek to occupy all avenues to wealth and the many who are pressed to gain a livelihood by subserviency; between favored families, here and there, who are building up colossal fortunes fit for princes, and the pinched majority who must accept wages and small salaries if they would live at all. False business conditions arise from such a state of things, while the spirit of specu-

lation and plunder, the ambition to get rich quickly and live without continuous effort, gains mastery.

Again, in the relation of labor and capital, as industrial unions grow gigantic, we see portentous danger. Not only does the distance between employer and employed fearfully increase in pecuniary means, but the two classes grow farther apart in helpful intercourse. While men of moderate capital owned and ran their own industries, master and workmen stood side by side and were personally acquainted; human sympathy deepened solicitude on the one side and devotion on the other. Strikes were unknown in those days and the labor market was open. And so in a measure where corporations were small. But now huge capital organizes its resources and holds but remote and formal contact with labor, the high officials keeping aloof like officers of an army and trusting close dealing, as it were, to non-commissioned sergeants and corporals. Under such conditions of employment, loyalty in the employed becomes deficient or wholly wanting. Capital organizes on a vast scale to gather in, to appropriate, to monopolize; and labor in return organizes and seeks correspondingly to control the market. Demands and counter-demands are made through representatives and committees; strikes or lock-outs are ordered and funds wasted on either side in huge experiments of physical compulsion. It is not strange that in such brute contests of strength, capital should have the advantage; for money resources are on its side; and the higher advantage, too, of intellectual acuteness. For labor,

in its best estate, promotes those worthiest, mentally and morally, to the class of employer; and any permanent class of laborers who live in constant dependence for their wages by unskilled manual toil are at disadvantage in a conflict, like common soldiers who would conduct a battle against trained generals. Violence, destructive energy against person and property are their weapon, unless fear of the law or an adverse public opinion restrains them.

It is not, as some assert, mere manual toil that produces wealth in a mill community; nor is it mere machinery. Rather is it the higher intelligence that can organize and direct the labor, or invent and apply the machine; and capital, moreover, bears all the risks, furnishes plant and materials and guides the whole enterprise, if it may, to profitable results. Labor, then, can effect little for wealth outside a farming class, without the skilful direction of capital. And hence a division of the fruits of industry. The weakness of labor for legal redress consists in its poverty; the weakness of capital in that it cannot sue the moneyless in tort or contract with practical effect, and hence in the courts must rely upon injunction or criminal process for due protection. Each party, however, respects, in any contest, the opinion of the public to whom it appeals for sympathy and support; hence a new Canadian law deserves attention, which, admitting that arbitration cannot be compelled, provides, nevertheless, for every proposed strike or lock-out an impartial tribunal, such as public opinion should respect, to pass upon the issues involved and make report, before the harsh extremity shall be lawful. In the very effort each to establish the justice of its own

case, both labor and capital may yield thus to reason and right.

But labor and capital, in their widest range of separation, can hardly be called, after all, an indigenous product. To European countries, rather, where class conditions are fixed, the distinction applies. The real American, born and nourished on our free soil, rises rapidly from a mere workman to skilled mechanic and employer of the unskilled. And thus do even intelligent and aspiring artisans from abroad — like the Scotch Carnegie, for instance — rise from the depths of poverty in our midst to become millionaires and multi-millionaires. Education and opportunity are the precious gifts our country has hitherto afforded and should always afford to every one. Said Abraham Lincoln, in a speech in 1854: "There is no permanent class of hired laborers amongst us. Twenty-five years ago I was a hired laborer. The hired laborer of yesterday labors on his own account to-day, and will hire others to labor for him to-morrow. Advancement — improvement in condition — is the order of things in a society of equals." ¹ Nor was it many years after such utterance that this same man who had once ranged among hired laborers ruled the United States as chosen representative of the whole people, and made a name and fame to endure forever.

I am American enough to dislike that exaltation of labor as embodied in a special class of manual workers — and a privileged one — whose members make boastful demonstration as peculiarly the type of a democracy. Our "labor day" means little but idleness and parade. We should have no affiliation,

¹ Abraham Lincoln's Works, 179.

real or pretended, with those destroyers of all property, all government, all stability of social life and order, whose schemes and dogmas are propagated in foreign countries as friends of the laborer.

For citizens of a republic founded in equal rights, the remedy for prevailing ills lies largely in themselves. They among us who have gained superior wealth and station should avoid such showy and profuse outlay as to excite the envy or foolish emulation of those less fortunately placed. Their style of living should not be ostentatious, even if expensive, and in generous bestowal they should discriminate and set a just example. Tips, as we call them, which formerly no self-respecting American would accept from any one, are growing into an intolerable tribute for paid attendance; and we debauch an old-world practice which makes for class distinctions by exaggerating the gift beyond all reason and playing the grandee to fellow-citizens and fellow-voters who may chance to serve us. Supercilious demeanor, purse-proud arrogance, and even that good-humored prodigality of display to which as Americans we are more addicted, all tend to foster the spirit of caste and privilege, which among a free people should be kept down.

A grand house and grounds, where you can afford them, will give visible delight to your neighbors, besides aiding the taxable resources of the community. Fine furniture, books and tasteful works of art tend to general culture; nor would I disparage happy surroundings for any home life, commensurate with one's means. Yet the American

home should be the abode of good taste and convenience, and not provoke society by its owner's lordly assumption. In no respect is a man so entitled to consult his own wishes as in the style and management of his household according to what he can afford; but when it comes to emulating a nobility abroad in exclusive parks and preserves, a pompous retinue of menials, and those showy and selfish accompaniments of domestic life which foster the spirit of luxurious contrast, republicans born may protest. We encourage the display of wealth in our women folk; and they make costly dress and adornment to please us. But men I have known and respected, who refused to set up a showy coach and livery when they could afford it, because heedful of native prepossessions and wishing to set a democratic example.

Of all recent inventions for the pleasure of the rich, nothing, it seems to me, widens so impressively class jealousies among us as the automobile. This costly toy, which only the few can afford to keep and own, is the symbol and epitome of obtrusive arrogance towards the multitude, offset only by the danger it brings to those themselves who use it. The gorgeous coach and six which scattered the dust as it bowled along harmed little, after all, and took only its own share of the road. Of turnouts with a horse there are still all sorts and kinds for the people. Our monstrous electric cars are for the multitude, and if we keep clear of iron tracks we are safe. But an automobile appropriates the whole road and right of way; with tooting horn and malodorous breath it speeds like a dragon, death-dealing, ravaging roads which others are taxed to maintain, exposing to sure

danger those who ride by old-fashioned modes, and sending pedestrians at the street crossings in flight for their lives. For at the slightest pressure of a lever this conveyance will rush like a locomotive, while mischance or misdirection may impel it hither or thither so as to make not even sidewalks safe. If, as now seems likely, this motor car is still to roam at large, despite the new dangers it has brought to travelling, two things should force attention: its use should be clearly limited by license and inspection; and, on the general behalf, certain roads should be closed against it altogether.

They whose means are ample may, in a society like ours, disarm envy and keep down presumptuous pride while yet enjoying in a true sense their earthly blessings. They may give liberally with discretion and may foster good works of religion, learning and philanthropy. Indeed, a private tithe for charity ought to be set aside systematically from every one's income, as he may afford, not less than for the public taxes. Nothing, hitherto, has so exalted our American life, despite all eager pursuit of wealth, as the generous spirit of so many rich among us, in endowing and maintaining by voluntary gift or in supplying government with the sinews of strength at times of public danger. We honor the memory of our Franklins, our Girards, our Lawrences, our Hopkinses, all self-made men. Even they who have heaped up their hoards by ruining rivals wilfully may make amends with society, almost if not altogether, and lay up reparation for the hereafter, by bestowing in the interest of their fellow-men before

it is too late. And, under all circumstances, a private fortune which helps build up, broaden and liberalize, and makes its owner instrumental to the happiness of others, is well borne.

I suppose the time will never come, unless in some golden age far distant, when the highly prosperous lead simple and abstemious lives as a class and cease to flaunt their prosperity. Self-denial we leave to the hermit or enthusiast who is rarely rich at all. The wealthy, unless mean and miserly, seek a liberal style of living, add luxury to comfort, love jewelry and costly clothes, spend lavishly in entertaining to gain social position, and think they benefit the poor and humble when they scatter coin as though to proclaim their own superiority. Fortunate, indeed, if the vulgar who suddenly gain riches do not waste their lives and money in low and sensual pleasures and all the "superfluity of naughtiness." Yet fortunes are better preserved by ambitious founders than when our political experiment began; so that through guarded marriage alliances and those refining advantages which wealth affords, another generation born to affluence may give something of stability to social rank even in our republican society. The danger lies in letting such stability gain too much of a family permanence.

One more corrective to an undue strenuousness in life which we Americans should cultivate is to moderate our zeal for mere money pursuits and place a limit to eager accumulation. One's aim in life should rather be to conform his career to native conditions of plain and moderate living. Some one

has well said that for those who live beyond the age of three-score and ten, the seventh decade should be a sabbath of rest after Divine example. And true is it that, as in early youth we look forward, intent to enter upon an active life, so, when old age approaches, the means and method of withdrawing happily and honorably from activities should engage our thoughts. It is a mistake which we Americans so often make of devoting youth and mature life alike to active business pursuits until, like overripe fruit, we drop to the ground with juices spoiled and decay there useless. In the old-world civilization whence we were derived, where the great middle class have long handed pursuits from father to son, one thinks his paternal work well ended when he gives over the business in good condition, as his children grow up qualified for responsibilities, and rewards himself with a respite of ease and retirement.

For our daughters — if they keep to the lesser sphere which convention once assigned them — let us provide portions and an easy income, if we may; but for our sons, in most instances, and surely for scions competent in life and fit to win a livelihood for themselves, the greatest boon we can confer is that of starting them promptly and well upon their own careers, while the bestowal most likely to prove a curse is to endow them early with effortless luxury. Even for ourselves, we may lay up an ample competence to withdraw from business risks at fifty, while, by continuing therein twenty years longer, we may lose all and die in indigence. It is well to study then how to grow old gracefully. National wealth and welfare do not require that each shall keep on heaping up his ambitious pile; for the incessant

strife to surpass fills quickly the vacancies made, while it affords true opportunity to the young, the needy and rising, of the coming race. The noblest stage of human existence — both for its possibilities of good to others and the broadening scope it gives to one's own achievement — is often that of retirement from business activities, and especially from such as are sordid and vexatious. In travel, in books and observation, in kindly contrivement for fellow-men and the welfare of society; in the solace of private life or by imparting wise thoughts and suggestions; in unrecompensed activity or a pecuniary support on behalf of worthy objects, one who has thrown off the harness of routine work and labor and is blessed with a competence may extend his sphere of usefulness upon earth and gain when gone a blessed memory. Nothing can so fend off destructive socialism or anarchy in the land as the example of willing help to others by those privileged to afford it.

Yet, on the whole, viewing the general range of opportunities public or private — and surely, one of independent means has superior advantage for seeking a high public career, — I am of opinion that it is better for most of us to begin life poor enough to have our own living to make, and to achieve by our own exertions; so that, if we inherit at all, we shall inherit only when mature in years and experience, after having learned to lay up something of our own and to comprehend what money itself is good for.

Government has its own duties to perform, directly or indirectly, for promoting in the republic that

harmonious adjustment between social equality and the ambition to surpass which should always exist. But government is for mankind, not mankind for government. The enormous expenditure which ambitious nations keep up to-day in troops and battle-ships bodes no good. In times of profound peace we make warlike menace through rivalry; we tax ourselves for almost the money cost of a war, in order to prevent war; the premiums paid for insurance amount to nearly the face of the policy. Let the great powers make treaties together for disarmament; and let America, most of all, cease to dread, by giving up Asiatic conquest and making supremacy on this hemisphere, as formerly, her sufficient mission.

Except for promoting peace and good order, a government like ours should do little more than to encourage private enterprise and keep clear the avenues of opportunity. Protection in any paternal sense is sure to breed privilege and partiality. A tariff standard ought to be periodically adjusted to economic needs with fairness both to producers and consumers among the people; nor can it be said even yet, I think, that our national policy on that issue has become permanently fixed, beyond recognizing the immense extent and variety of our home market for demand and supply. If high tariff be not literally the mother of trusts, as some have claimed, it certainly over-nurses them; consumers are bled for the producers, and even though labor might seem to share in the enhanced profit of an industry, the profit of the protected employer is relatively far greater.

To check the disparity of wealth among our

people by other means than withholding privileges is not impossible; but laws should be equal and equally administered. National decay impends where

“Laws grind the poor, and rich men make the law,”

and where, too, on the other hand, the poor, by right of a majority, put burdens too heavily upon the prosperous and rob individual or corporate energy of its fair reward. As to taxing incomes and inheritances, our States levy already to a considerable extent, and, indeed, in the latter respect, vie with one another contentiously; and the question is always pertinent whether Congress shall, under no great stress of emergency, superpose national burdens of this kind, to the double despoilment of wealth or so as to deprive State governments of their just resources. That government is, after all, the best and the best borne, which avoids a vast surplus as it would a vast deficit — which simply collects from the people what revenue it needs and pays out faithfully what it owes, leaving no balance of consequence behind and no arrears.

How, we may ask, should government deal with transgressors of the law? It should pursue them with justice and discretion and punish for the general good; its zeal should appear not for popularity or political effect, but so as to impress by example; its motives should neither be vindictive nor open to the charge of favoritism. For general enforcement of the laws, our courts stand always open to individual suitors — and, moreover, to the aggrieved instiga-

tors of a prosecution. Government itself may of its own initiative proceed against offenders; yet the administrator who seeks a tribunal of justice should not regard himself as both judge and prosecutor. Indeed under our well-ordered system, President or governor is encouraged to discriminate in the public interest; since our constitutions give him full power of pardon and amnesty for offences and permit him broadly to temper the justice of the courts with mercy. When I say "to discriminate," I do not mean so as to spare individuals alone in a certain class of offenders, but so as to pardon a whole class of past offenders; for an executive should be most of all intent upon what the immediate good of the body politic requires.

Nor is it needful in the public interest that our chosen executive should, with his many important functions to perform, be always intent, or keep the people intent, upon pursuing and punishing. Administration is not a steeple-chase, for a constant tally-ho, in running foxes to cover. Much may be done by warning, by holding up ideals of duty, by encouraging the community to keep the right path. But the rod of discipline should not always be brandished, nor a culprit's foes or the immune be incited to gleeful vindictiveness. There is not, I suppose, a male reader of this page who has not at some moment of temptation in his life committed a wrong of some kind which might have been criminally punished. And whether the offence, more or less heinous, was ever disclosed to others or not, has he not been better in the end by having his own conscience left to its secret remorse and repentance for lifting eventually his better nature? If a court

of justice must intervene, let it do so, at least, in soberness and regret; and let rulers beware of setting class against class intemperately; of encouraging failure to down success, of punishing the ownership of property, as such, rather than the wrongful acquirement or the wrongful use of property.

And furthermore, I would suggest, that as magnanimity becomes a commonwealth and its chosen magistrates so may it sometimes be wise and prudent to give transgressors notice in advance of an intended purpose, and prevent, if possible, guilt in the future while giving some measure of amnesty for the past. Statutes themselves may be uncertain or misunderstood. Let us recognize a situation in which pardon or forbearance may have more salutary effect than stern retribution. Public policy itself, in the rapid change of men and parties in power, is often fitful and variable, among a people like ourselves. For one term of years our rulers permit and encourage abuses to spring up and spread, while commending that private enterprise which develops boldly, by risk of capital, the general wealth and prosperity; and then in another term we undertake to punish those abuses of the enterprise, of which government was long heedless, though cognizant, and which should have been checked earlier. Timely constraint, the prevention of wrongs incidental to the social and business life of our people, is what government needs, but greatly lacks. We are easy-going in enduring ills before they become grievous; we change rulers, policies, methods, and with them our public moods; we suffer ills to creep into our system and only unite to put them down when they become intolerable.

There is much extravagance at the present time in the passion for throttling, managing and harassing the so-called public-utility corporations. If public rate-making and interference is so desirable for such concerns, why not for others, besides, which make for popular comforts in life — for industrial corporations which deal in beef, oil, sugar, for instance, or for the makers of clothing fabrics? Newspapers we find, employing large vested capital, which thrive upon all such popular agitation and excitement; and when we ask how their owners would like to have subscription and advertising rates fixed by some political commission, they say that the public-utility corporations stand differently, because they have public favors. And what are these public favors? Railroads are allowed to take land they need by paying well for it; and in times when their enterprise was thought to bring local prosperity, a grant of vacant public land was sometimes given besides. Water, gas, and electric companies have been granted the use of public highways, from like considerations of local advantage and comfort; and then we see rival competitors privileged in like manner, to the ruin of reasonable profit. And have not industrial concerns and mills also received public favors? Study closely the schedules of our present high tariff. Newspapers, too, claim the fostering solicitude of government. The postoffice admits their matter at losing rates; and when the cost of their paper pulp is found enhanced by a protective policy they urge Congress to change the law for their special benefit. The radical trouble to be treated is our inordinate American greed, in all business pursuits, for undue profit, for excessive wealth, for

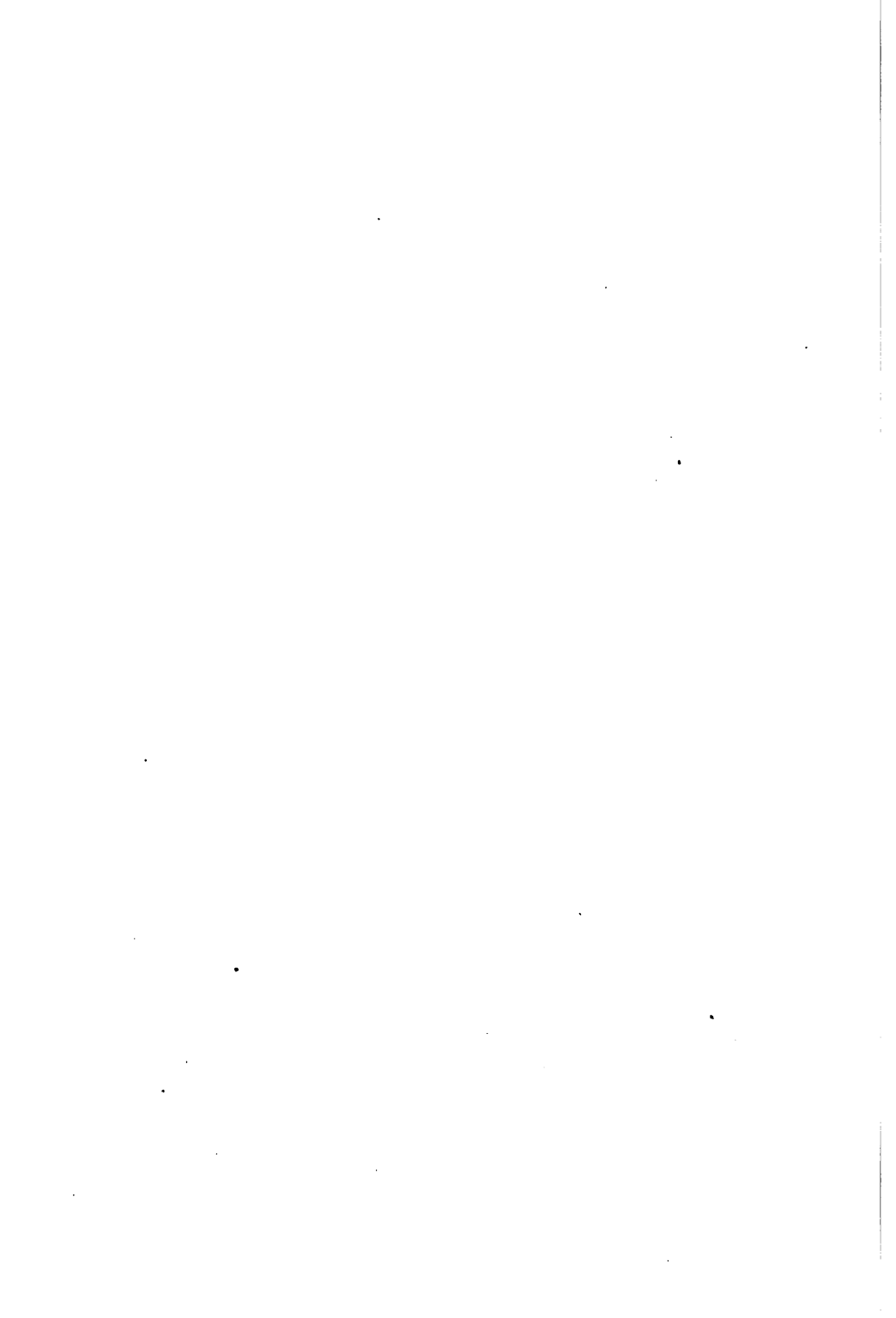
appropriating selfishly whatever pecuniary advantage may be anywhere in sight. Even farmers and planters combine to force up the price of their corn, wheat or cotton to the highest point. Our difficulty is not so much with the public-utility corporations as with the whole business public itself. Regulation should not mean strangulation. The legislature or the city council should grant corporate favors on all occasions with justice, honesty and discretion; public policy should go by fixed principle and the rule of fair bargaining; and the more that public regulation is insisted upon, with any corporation, the fairer, as an offset, is it that ruinous competition be kept down and something of a monopoly permitted. Why mainly the common law put its own fair constraints upon all those engaged in public-utility pursuits was, not that they enjoyed special privileges, but because the public had to trust them.

Each succeeding administration in a republic impresses its character and example upon the people governed. If rulers are violent and menacing in one direction or another, the people become violent and menacing too. That country is the happiest, the most prosperous and the most virtuous, whose rulers personify simple honesty and patriotism, and whose administration moves on in serene majesty, like the planets above us. The Massachusetts charter of 1780, which I have so often quoted in these chapters because it formulated after much deliberation the ideals of our thirteen original States in a most expanded expression, recommends, besides other things, that government should encourage

"good humor " among the people. We, as a people, at this advanced stage of our national progression, have gained a world renown in that respect, which our ancestors had not in the earlier days of experiment. And the unifying influence of good humor — whose supreme exaltation is joy — has been well expressed in those noble lines of Schiller which Beethoven set to immortal music:

"Thou canst bind all, each to other,
Custom sternly rends apart;
All mankind are friend and brother,
Where thy soft wing fans the heart."

A NEW FEDERAL CONVENTION



A NEW FEDERAL CONVENTION *

MORE than a century ago, when the first compact of American Union had proved inadequate to its ends, and the amendment of that compact by the unanimous consent of the thirteen States was found impossible, our forefathers made appeal to a general convention. It was their last resort; a drastic remedy, and yet the only one for the political ills they suffered. Well might a minority of the people, averse to radical change, still clinging to State sovereignty and the Confederate idea, have dreaded such a gathering; for from the throes of that general convention which met in 1787 at Philadelphia issued a new-born nation. There was in those days something ominous, something revolutionary, in the very word "Convention." It was the "Convention" that in France, not long after, held the torch to anarchy and misrule. On this continent, conventions in the several States had lately cast off the cords of colonial dependence and organized new republics. Of social, religious, or business conventions, such as posterity has grown familiar with, little was then known in a local and far less in a national sense. That political or party convention which in our own age puts forth platforms and candidates, had as yet no being; and by "Convention" was meant, rather, in the eight-

* From the author's address at Cleveland, Ohio, in December, 1897, as President of the American Historical Association.

eenth-century parlance, a solemn gathering of the people's representatives; an assembly from the depths, freshly chosen, to change and supplant existing institutions. For that supreme function of the body politic our Declaration of 1776 had in the name of all the American colonies given warrant, by announcing that "whenever any form of government becomes destructive of its fundamental ends, it is the right of the people to alter or abolish it, and to institute a new government." That basic right was by 1787 fully recognized. Commonwealths like Virginia relied with confidence upon that popular fundamental right implied for future exercise, without the shadow of a written suggestion in the State instrument itself as to how practically it should in the future be amended.

What, therefore, the people of our several States might fundamentally ordain for altering the local organic law whenever needful, the good people collectively of these United States had equally an inherent right under Confederate safeguards to accomplish. Yet in this expanded sense the convention of Philadelphia was a novelty, and continues such to this day. State conventions have since met to frame and submit new amendments, new constitutions, but a Federal convention never again. Prior to 1787, and throughout the long and agonizing contest with Great Britain, the Continental Congress had been for these United States the only real convention. Congress was the convention throughout that long struggle, and the convention was Congress. Doubtless the sublime fame of Washington as commander in chief shone out the more resplendent in that simpler age because,

in his own military person, he was throughout the Revolution the sole embodiment of a Federal Executive, to contrast with that single chamber, assembled as a legislature behind closed doors, that commissioned and controlled him. How different the aspect in our late civil war, when, under our reconstructed Federal system, we saw the fame of the greatest generals in the field eclipsed, partially at least, by that of a President, whose official guidance in full panoply, as political and military leader of the people, made him preeminent above all subordinate warriors or statesmen who cooperated in his success.

In a national sense, then, the convention of 1787 stands alone in our annals. Yet during the long intervening years, America has seen that marvellous scheme of united government extending its scope over a continental area and population such as the fathers could scarcely have conceived. And yet with all this wonderful increase of the nation in area and numbers, not only has revision of our Federal instrument been constantly wanting, since that first completion of the convention plan by the States adopting it, which was formulated in the first ten amendments, but for specific improvement in the plan there is absolutely nothing to show, save for two casual corrections in detail, which after the space of sixty years were followed by the three famous freedom amendments of civil war, written indelibly in blood.

One might almost suppose that constructive statesmanship, in a Federal sense, ceased with the eighteenth century; but when we turn to the experience of States and to State organic law, we are taught a different lesson. There we see the American political

mind and American ingenuity still at work; and the spirit of organic change and improvement strong, constant, and irresistible. There we perceive new constitutional amendments, new organic instruments, proposed and adopted for States both old and new, until at the present time Massachusetts, alone among the thirteen original commonwealths, preserves a constitution of earlier date than our Federal instrument; and even that constitution is so patched with amendments that little of the original garment remains visible. From this State point of view we discover that America has advanced far beyond the age that gave birth to our Federal Constitution in ideas of practical self-government. Admirable, no doubt, was that common scheme, and high advanced in humane ideas; and in the general adjustment, as between State and Federal authority, as well as in the general poise of the three great departments, it can hardly yet be improved. Nor did the delegates who sat at Philadelphia show sound wisdom in any provision more than in that which allowed representation in the House of Representatives and in the choice of President to be shaped and regulated as opinion in the several States might conduct. But what our generation may claim by way of criticizing this famous instrument is, that States have developed organic improvements of practical detail in government to suit our modern society, which well deserve to be nationalized.

I have said that no Federal convention, for the merest revision, even, of our general system, has

met since 1787. But something like an approach to such revision occurred in 1861, when leaders of the cotton States, experienced in national councils, undertook to organize at Montgomery a Southern Confederacy. In closely adapting the constitution of the old Union to their united wants they made various changes in the Federal mechanism, some of which we might, I think, judiciously copy. I shall not here provoke discussion of a cause overwhelmingly defeated, but merely emphasize by such a reference the fact that a body of men, ripe in public experience, can hardly, in this modern age, apply their minds together to our Federal scheme without discovering, from State example alone, some parts of that system that are worth amending.

First of all, in the very methods pointed out for organic change we see in that Federal instrument imperfection. The door of amendment for so prodigious a system of Union may well prove difficult to open; nor do I deem it so practical an objection as many do that ratification of every Federal amendment by three-fourths rather than two-thirds of the States is there enjoined, since experience shows that a basic change to which a decided majority of the States is once strongly committed will readily widen its impulsion to a greater number. But a more serious difficulty appears in the initiation of Federal amendments. Here, we find, there may be either initiation by States or initiation by Congress. Whenever two-thirds of the States, through their several legislatures, propose a convention, Congress must call it; and the danger then arises that changes so crude, so numerous, and so incongruous might proceed from any plenary convention of the kind,

not intent upon gaining some special end, that the American people would run the instant risk of being launched, at length, into a worse rather than a better government. To this the alternative is that Congress shall, by its own two-thirds vote of both Houses, propose specific amendments; and such, hitherto in our annals, has proved the only acceptable course for initiating organic change. But how can we expect both Houses of Congress to unite readily by such a vote in proposing amendments, however salutary, which would cut down the patronage and influence of either branch? Should, then, a convention be ever compelled by States under the former method, it would be well for those States in concert to frame concrete propositions of amendment carefully in advance, and for any Federal convention, moreover, to put forth propositions for a separate vote, so that all need not stand or fall together; for thus may the people, in passing upon the whole work, sustain the good and repel the bad. More than this, it would be well if our Constitution clearly authorized a limited general convention; and here we note that the Montgomery plan of 1861 made it obligatory on the Confederate Congress, whenever a certain number of States concurred in proposing specific changes, to summon a Federal convention, which should consider and act upon the specific proposals alone.

Now, to subject to criticism the first and chief topic of our Federal Constitution — the legislature — our modern American age may fairly ask, by way of specific change, that Senators of the United

States be chosen by the people of a State at large. Such a change would conform to general political usage at this day, and State voters may well feel that a fundamental right is denied them so long as their representatives in either branch of Congress continue to be chosen otherwise than at the polls. That legislative practice, though originally commendable, proves pernicious in the course of a century.

Next, to consider improved modes of Federal legislation. On all subjects within the scope of Federal authority Congress may enact by the bare majority of a quorum in both Houses unless the President chooses to arrest the measure at its final stage by his official veto. Such is and has always been the rule of our present Federal establishment. But this by no means conforms to later State usage, as shown in State constitutions. On the contrary, our American tendency is clearly to interpose greater barriers to legislation, on some topics at least, than the majority will of a bare quorum in each chamber. The number of States increases constantly where the fundamental requirement for the passage of all new legislation, or at least the most important part of it, is a majority of all elected to either branch. Nor to depend too much in a republic upon the Executive veto (a recourse which gains in popularity as time goes on, and yet might fail us) our State constitutions in various instances constrain the legislature in its own original action by insisting upon a larger fraction to pass the measure than any mere majority. To apply such a rule in amending our Federal instrument, a two-thirds vote in each branch of Congress might, perhaps, be

insisted upon, in borrowing and pledging the public credit beyond a certain limit, in changing the currency, or so as to restrain unlimited appropriations or the declaration of war. Under the Montgomery constitution, to which I have alluded, the Confederate Congress could not appropriate money, except by a two-thirds vote, unless the appropriation had been asked by an executive department, or was for the expressed contingencies of Congress, or for some private claim already judicially established in the Court of Claims.

In no respect, as it seems to me, is it plainer that more than our present bare majorities of a quorum should be required, than in such momentous legislation as disturbs our national equilibrium by admitting new States into the Union or by sanctioning the acquisition of alien territory with an alien population. In the latter respect we seem simply to have gone forward without clear warrant from our Federal charter at all. When President Jefferson gained by treaty the great Louisiana purchase, extending the Union by nearly half a continent, he candidly confessed his belief that a permissive amendment to the Constitution would be needful; but yielding his views to those of his party friends, he made for these United States the first real precedent of foreign annexation by treaty. Public approval here resolved whatever doubts might have arisen, and the precedent was repeated, under Monroe as a successor, when Florida was purchased from Spain. Both acquisitions were peaceful and honorable.

No readjustment or change under our Federal compact seems needful as concerns the general

powers of Congress or of the Federal Government. In that respect, certainly, the fathers were eminently judicious; and all that posterity can yet do is to bring some suggested changes into the forum of discussion. It need not be thought surprising that men of some party affiliations may wish Congress prohibited altogether from allowing bounties or extra compensation, or from appropriating for internal improvement, or from passing tariff acts of a protective character, while those of some opposing sect will welcome broad paternalism. National divorce laws and a divorce system may on some grounds be highly desirable, yet Congress could hardly pass a bill on that subject which would not be thought too lax in some States and too strict in others. To turn from express powers to the express prohibitions of our present Constitution, it is curious to observe that, while in 1787 our Southern staple raisers caused the denial to the Union of all right to levy export duties on American products — whence it happens that our customs-revenue system is always one-handed — the posterity of those planters expressly authorized such a tax when creating the Southern Confederacy (though under the constraint of a two-thirds vote), and hoped much financially for their cause from such a revenue. Would it be possible, then, to remove at this late day that express prohibition of our Federal instrument? On the other hand, there are prohibitions which deserve to be added to those already manifest in the organic text. For my own part, there is one express prohibition to the States which I would wish to see literally extended to the Union, so as to make positive and comprehensive what our people long supposed was

the fundamental effect; and that is, equally with the States, to forbid the United States to emit bills of credit, make anything but gold and silver coin a tender in payment of debts, or pass any law impairing the obligation of contracts.

Among miscellaneous clogs upon legislation that we find to-day in State organic law some might perhaps be fairly fitted to Congress. Thus, appropriation bills shall contain no "riders," no extraneous provisions; no law shall be passed on the day set for adjournment, but bills may then be enrolled; on some designated date all acts of the session not otherwise fixed expressly in point of time shall take effect, and all retrospective laws are forbidden.

To pass to the Executive: the foremost change of all to be desired in this department of Federal administration is in the mode of electing our Chief Magistrate. In these days, governors of the States are chosen once and finally at the ballot box, and where no one is found on the official count to have received a majority of the popular vote, a plurality almost universally decides the result. For political experience teaches plainly that the highest candidate among several should come in, rather than have repeated contests at the polls or refer the test to any umpire. But here the fundamental law of our Presidential elections is altogether redolent of the eighteenth century. In the first place, popular elections elect only an electoral college, and next, where no candidate for President receives an aggregate majority vote in those colleges, a plurality effects nothing, and the right of final selection reverts

to Congress, or rather to a House of Representatives whose term has nearly run out. Nothing can be more obnoxious to modern American sentiment, more unpopular. Until the people's will shall sufficiently establish the title and legitimacy of each Chief Executive, hidden perils are liable at every new four years' encounter. As for changing the present term of the Presidential office, opinions will differ. The Montgomery government set up a tenure of six years without reelection instead, but a large part of our people are doubtless well satisfied to leave the Presidential term as the fathers fixed it, with full right of reelection, limited, however, by custom or by fundamental law, to eight years. For the time, moreover, of entering upon the duties of Chief Magistrate, and so correspondingly for the commencement of each successive Congress, our historical 4th of March became originally set by a casualty of legislation; that date ought, as it seems to me, to be shifted backward, and certainly not forward. And here again it is worth mentioning that, in the calendar of the Montgomery establishment, Washington's birthday, the 22d of February, was substituted.

Nothing perhaps in our constitutional system has more generally commended itself in a national sense, or has been more widely copied by States, than lodging vast power in the hands of a Chief Executive, to offset that of the legislature. For if Congress must be considered as the assembled representatives of our people, arranged by States or constituencies, the President is himself the representative of the whole people, chosen differently, and responsible after his different fashion. In other

words, executive and legislature act each as an important check upon the other.

Impeachment, I may further add, as a means of punishing civil officers, Federal or State, is now almost a bygone remedy, for our modern legislature is too busy with other affairs to organize and sit as a court of justice, and the ends of justice are liable, moreover, to defeat where political interest is strong. States set now-a-days the example of a summary removal of civil subordinates by the legislature or executive on a two-thirds or three-fourths vote in each House. Or if such subordinate be thought guilty of crime, he may be prosecuted in the courts under the usual safeguards of a trial, and, if found guilty, disqualification from office may be entered as part of the sentence. Impeachment in practice, under our Federal Constitution, has been found mainly useful only for getting rid of some incumbent of the inferior courts whose honorable tenure of good behavior is justly forfeited by some offense not political.

God's kingdom is perfect in type; God's laws are unchangeable. The same human organism that received into its nostrils the breath of life, the spark of divine essence, still walks the earth fashioned physically as in the first historic age. But man's conceptions seek to fathom the mind of his Creator, and whatever he may invent, be it in matter or spirit, his first rude result yields gradually to a better sense of utility. How different the earliest printing press, the first steam engine of civilization, from the latest combined product of human brains that

incubate in succession upon the novel idea! So is it, too, in human government. Politics is properly an induction. The philosophic mind when once aroused seeks ever how to conform by change and improvement the institutions of society to God's perfect plan. These are the pillars modelled by our Divine Architect, who teaches mankind to imitate in all things. There is no real statesmanship which is not conservative of whatever is good in past results, nor is there real statesmanship which is not on the whole progressive. "Applaud us when we run," says Burke, "console us when we fall; cheer us when we recover; but let us pass on — for God's sake, let us pass on."

In geographical site and supremacy on this new hemisphere, and in the knowledge of self-government at the start, were grand advantages for this American mission to society. Foreigners said long ago that there was less philosophy among our people but a better application of it than anywhere else. Perhaps it should better be said that we have a philosophy of common sense clear enough to ourselves to be applied for immediate ends. No intelligence can on the whole be so safe for public guidance in affairs as that of millions of intelligent and honest freemen. For the wisest of statesmen in his own conceit is like the captain of a vessel who sets his helm by the compass, and seeks, in disregard of wind or weather, to reach port by a straight line. The true politician, it has well been said, is rather "the philosopher in action," who finds proper means to public ends and employs them with effect.

Our written systems of government, State and Federal, our organic institutions, are excellent.

They furnish their own patterns of expression. Other communities, in the New World or the Old, may copy and adapt as they choose. Under them we are kings, kings by right of the majority, if we do but know it. No citizen need despond, nor suffer from tyranny, if he uses well the franchise bestowed upon him and fulfils his political duty. But good government is not a gratuity; for every citizen, high or low, owes something to the public subtracted from his private concerns and attention. Just as we see contemporary nations of Europe, with their vast standing armies, forcing able-bodied youth to give some years of his life to military service, so in our peace-loving Union opinion may well press conscripts or volunteers, as the case may be, into the public cause in early manhood, and teach men how to become, if not useful officials, at least useful voters. Public service, at all events, is not summed up in salaries and spoils, nor is true patriotism measured by a pension. Finally the true "Monroe doctrine" for the New World, as originally formulated by capable statesmen, was not for conquest but for self-conquest; that we should set before the poor and suffering communities of this New World, less favored than ourselves, the shield and spectacle of a noble national example.







14 DAY USE
RETURN TO DESK FROM WHICH BORROWED

LOAN DEPT.

This book is due on the last date stamped below, or
on the date to which renewed.

Renewed books are subject to immediate recall.

20 AUG '57 NB

REC'D LD

AUG 31 1957

IN STACKS

REC'D 1959

DEC 21 1959

31 Oct '60 LF

REC'D LD

OCT 30 1960

28 Nov '60 FK

REC'D LD

LD 307 B3 1960
(B931.1410) 970 NOV 30 1960

General Library
University of California
Berkeley

xco 4e

YC 08937

176774

UNIVERSITY OF CALIFORNIA LIBRARY

JK276

.S4

